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# Massachusetts Law Quarterly

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MASSACHUSETTS LAWYERS' INSTITUTE

NEW OCEAN HOUSE

SWAMPSCOTT — JUNE 11-12, 1948

Issued by The Massachusetts Bar Association

53 State Street Boston 9, Mass.

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# *Seventh Annual*

# *Massachusetts Lawyers' Institute*

NEW OCEAN HOUSE, SWAMPSCOTT

JUNE 11 and 12, 1948

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## PROGRAM OF THE INSTITUTE

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ALL LAWYERS AND THEIR FAMILIES
ARE CORDIALLY INVITED

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JAMES E. FARLEY, CHAIRMAN

SALEM, MASSACHUSETTS

THE REGISTRATION FEE (NOT APPLICABLE TO THE WIVES OR HUSBANDS OF THOSE ATTENDING) WILL BE TWO DOLLARS FOR ALL OR ANY PART OF THE SESSIONS. HOTEL RATES WILL BE FOUND ON PAGE 4.

# *Program*

## FRIDAY, JUNE 11

| | |
|---|---|
| 12:30-2:00 p.m. | Registration and luncheon.<br>THOMAS M. A. HIGGINS, President of the Middlesex County Bar Association, Presiding. |
| 2:15 | The Use of Documentary Evidence in Court, Professor JOHN E. TRACY of the Michigan Law School. Discussion. |
| 4:00 | The Lawyer and the Labor Management Relations Act, 1947, JOHN W. MORGAN. Discussion. |
| 5:30 | Cocktail hour. |
| 6:30 | Dinner. |
| 8:00 | MURL DANIELS PRESENTS "FAMOUS FACES". |
| 10:00 | Dancing. |

## SATURDAY, JUNE 12

RICHARD S. BOWERS, Presiding.

| | |
|---|---|
| 10:00-11:15 a.m. | Phases of the New Federal Tax Law, PHILIP J. WOODWARD. Discussion. |
| 11:30-12:30 p.m. | Preparation of Cases, DANIEL J. LYNE. Discussion. |
| 12:45 | Luncheon. |
| 2:00 | Annual Meeting of the Massachusetts Bar Association. Reports of officers and committees and election of officers. |
| 3:00 | Panel Discussion for the Members of the City Solicitors and Town Counsel Association. |

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|---|---|
| 4:00 p.m. | Annual Meeting of the Massachusetts Junior Bar Conference. (See below for complete program.) |
| 5:30 | Cocktail hour. |
| 7:00 | INSTITUTE DINNER. |
| | Honorable Louis S. Cox, Toastmaster, Retiring President of the Massachusetts Bar Association. |
| | Remarks by His Honor, Lieutenant Governor Arthur W. Coolidge. |
| | Remarks by Honorable Stanley E. Qua, Chief Justice of the Supreme Judicial Court. |
| | Address by Honorable Charles E. Wyzanski, Jr., District Judge for the District of Massachusetts. |
| 10:00 | Dancing. |

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## JUNIOR BAR CONFERENCE AGENDA

Public Information Program

a. Radio programs

b. Speakers Bureau

Committee on Relations with Law Students

Membership

Committee on Unauthorized Practice of the Law

Committee on Cooperation with Other Bar Associations

Committee on Minimum Fee Schedule

## Notice of the 37th Annual Meeting of the Massachusetts Bar Association

The 37th Annual Meeting of the Massachusetts Bar Association will be held at the New Ocean House, Swampscott, on Saturday, June 12, 1948, at 2:30 p.m. in connection with the Massachusetts Lawyers' Institute, for the election of officers for the ensuing year, consideration of committee reports, and for the transaction of such other business as may come before the meeting.

The report of the nominating committee accompanies this notice as provided in the by-laws.

FRANK W. GRINNELL,
Secretary

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*Report of the Nominating Committee*

The Nominating Committee herewith submits its nominations for officers and Members at Large of the Board of Delegates of the Massachusetts Bar Association to fill vacancies that will exist at the annual meeting to be held on June 12, 1948.

| | |
|---|---|
| President | RICHARD WAIT of Harvard |
| Vice-Presidents | RICHARD S. BOWERS of Brookline |
| | REUBEN HALL of Newton |
| | DANIEL W. LINCOLN of Worcester |
| | MRS. ELEANOR MARCH MOODY of Melrose |
| | JOHN T. NOONAN of Brookline |
| | WILLIAM A. O'HEARN of North Adams |
| | SAMUEL P. SEARS of Newton |
| Treasurer | PARIS FLETCHER of Worcester |
| Secretary | FRANK W. GRINNELL of Boston |
| Asst. Secretary | WILLIAM B. SLEIGH, JR. of Marblehead |

Members at Large — Board of Delegates

FLETCHER CLARK, JR. of Middleboro
JAMES E. FARLEY of Salem
DONALD T. FIELD of Brookline
HAROLD HORVITZ of Newton
MAURICE J. LEVY of Greenfield
LAURENCE M. LOMBARD of Needham
FREDERIC S. O'BRIEN of Lawrence

Respectfully submitted,

Horace E. Allen — W. Arthur Garrity
Raymond T. Barrett — Walter Powers
Edward O. Proctor, Chairman

Other nominations may be made in writing for any of such offices by not less than nine members of the Association by sending such nominations to the Secretary.

FRANK W. GRINNELL, Secretary

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## Massachusetts Bar Association
## Treasurer's Report for 1947

January 1, 1947

| | | | |
|---|---|---|---|
| Third National Bank & Trust Co. checking account | | $1,943.11 | |
| Worcester Mechanics Savings Bank | | 2,000.00 | |
| George R. Nutter Fund—2 Series "G" U. S. War Savings Bonds | | | |
| 1 M-103550-G | $1,000.00 | | |
| 1 D-511370-G | 500.00 | 1,500.00 | $5,443.11 |

MEMBERSHIP RECEIPTS

| | | |
|---|---|---|
| 1947 Junior Current Dues | 130.00 | |
| 1947 Senior Current Dues | 7,625.00 | |
| 1947 New Member Junior Dues | 60.00 | |
| 1947 New Member Senior Dues | 1,675.00 | |
| Dues for 1946 and prior years | 210.00 | |
| 1948 and 1949 Senior Dues paid in advance | 20.00 | |
| 1948 New Member Junior Dues | 76.00 | |
| 1948 New Member Senior Dues | 55.00 | |
| | | 9,851.00 |

MISCELLANEOUS RECEIPTS

| | | |
|---|---|---|
| Worcester Mechanics Savings Bank, interest | 53.32 | |
| U. S. Savings "G" Bond, interest | 37.50 | |
| Contributions | 7.97 | |
| Sale of Mass. Law Quarterly (back numbers) | 15.27 | |
| Post War Institute—Refunded by Institute | 1,200.00 | |
| Sale of Supreme Judicial Court Anniversary Books | 8.56 | 1,322.62 |
| Total Receipts | | 16,616.73 |

DISBURSEMENTS

| | | | |
|---|---|---|---|
| Central Office Expense | | 3,727.90 | |
| Treasurer's Expense | | 145.00 | |
| Mass. Law Quarterly | | 3,046.25 | |
| Membership Expense | | 463.84 | |
| Grievance Committee Expense | | 1.38 | |
| General Expense | | 209.69 | |
| Executive Committee Expense | | 244.49 | |
| Secretary's Expense | | 186.19 | |
| Bar Integration Expense | | 305.50 | |
| Mass. Law Institute | $1,183.50 | | |
| Less received from registrations | 516.00 | 667.50 | |
| Post War Institute—Refund to subscribers | | 1,377.50 | |
| Total Disbursements | | | 10,375.24 |
| Balance on Hand December 31, 1947 | | | $6,241.49 |
| Distribution of Balance on Hand: | | | |
| Worcester County Trust Co. checking account | | $741.49 | |
| Worcester Mechanics Savings Bank | | 4,000.00 | |
| George R. Nutter Fund, 2 Series "G" U. S. Savings Bonds | | 1,500.00 | |
| | | $6,241.49 | |

I certify that the above accounting is a true statement of receipts and disbursements for the Massachusetts Bar Association from January 1st, 1947 to December 31, 1947.

PARIS FLETCHER,
Treasurer

We, the undersigned, appointed under date of January 29, 1948 by the President of the Massachusetts Bar Association, the Honorable Louis S. Cox, to audit the report of the Treasurer of the Massachusetts Bar Association for the year 1947, report as follows:

"We have examined the report of the Treasurer of the Massachusetts Bar Association for the year 1947 and approve it."

Respectfully submitted,

ELEANOR MARCH MOODY
RICHARD S. BOWERS
Auditors

March 3, 1948

# Interrogatories as Pre-Trial Discovery in Massachusetts[1]

By George K. Black

*History*

Written interrogatories in actions at law began with the Practice Act of 1851.[2] At that time a party to litigation was not competent to testify as a witness. The incompetence could not be waived. A party could not place his adversary on the stand.[3]

Although the commissioners who revised the practice act in 1851 removed the common law prohibitions against persons convicted of crime, and against persons having a financial interest in the litigation, from being witnesses, and allowed such prior convictions, and bias arising from financial interest, to be matters affecting credibility, rather than competence,[4] they were reluctant to make the principals to litigation or their spouses, competent witnesses to take the stand and give testimony.

> ". . . we believe it would prove in practice to be anything but promotive of that equality which justice loves, and which is essential to the attainment of it, to allow parties to appear on the stand. We should also apprehend not a little danger of rash and inconsiderate swearing in the heat and excitement of a trial, when the stress of the case was felt, if dexterous examination and cross-examination should be applied to the litigants themselves."[5]

Prior to the practice act of 1851, the only method of examining an opponent or documents in his possession was by written

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[1] As pre-trial discovery, G.L., c. 231, ss. 61-68. Interrogatories to a garnishee in trustee process serve a different purpose, and are not within the scope of this note, G.L., c. 246, s. 12.

[2] "The right to interrogate the adverse party in probate was first expressly given by St. 1879, c. 186 . . . in equity suits by St. 1862, c. 40, s. 1."—*Moore* v. *Stoddard* (1910), 206 Mass. 395, 92 N.E. 502.

[3] A fraudulent method to defeat a subpoena duces tecum was to deliver the wanted document to a party to the litigation.—Colby, The Practice in Civil Actions & Proceedings at Law in Massachusetts, Boston, Little & Brown (1848).

[4] 1851, 233, 97; 1852, 312, s. 60.

[5] Commissioner's Report, to the Practice Act of 1851, p. 156; By St. 1856, c. 188 and St. 1857, c. 305, the parties to a suit were made competent witnesses except where the other party was dead or insane. By St. 1870, c. 393, this last qualification was removed.

interrogatories in a bill for discovery in equity.[6] Bills of discovery were the remedy by which equity prevented the miscarriage of justice, which otherwise would have arisen when an opponent could not be examined on the witness stand, nor otherwise interrogated, in a suit at law; and today, though a party may be a witness, and pre-trial discovery by interrogatories can be had in actions at law, a bill of discovery will still lie in a proper case.[7]

The creation of written interrogatories by the Commissioners who drafted the Practice Act of 1851, had the effect of making an equitable bill for discovery part of the machinery in an action at law.

> "The main purpose of these provisions of the practice act was to substitute, in place of the tedious, expensive, and complex process of a bill of discovery on the equity side of the court, an easy, cheap, and simple mode of interrogating the adverse party, as an incident to and part of the proceedings in the cause in which the discovery was sought."[8]

The original nature of the interrogation is further shown by the provisions in the 1851 practice act, that, although the trial should not be delayed by the failure to answer interrogatories, the court could allow examination by such interrogatories during trial, a proceeding which today is unnecessary where the opponent may be put on the witness stand.[9]

The practice act of 1851 gave parties a right to interrogate "for the discovery of facts and documents material to the support or defense of the suit."[10] This was construed by our Court to mean that a party could not interrogate as to facts which supported his opponent's case, but could only seek facts in support of his own case, as plaintiff, or in support of an affirmative defense, were he defendant.[11]

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[6] At that time no oral testimony was taken in equity. Everything was by deposition.

[7] *American Security & Trust Co.* v. *Brooks* (1917), 225 Mass. 500, 114 N.E. 732; See: 44 H.L.R. 633, 637 n. 30 et seq.

[8] Bigelow, J. in *Wilson* v. *Webber* (1854), 2 Gray (68 Mass.) 558.

[9] 1851, 233, s. 102.

[10] 1852, c. 312, s. 61.

[11] *Wilson* v. *Webber*, (1854) 3 Gray 558; See: F. W. Grinnell, "Discovery in Mass.", 1903, 16 H.L.R. 110-117; See: *Grebenstein* v. *Stone & Webster*, 205 Mass. 431, discussed 3 B.U.R. 205, 223.

The Act of 1851 made a distinction where the adverse party was a nonresident. There the 1851 act required a deposition. The distinction was abolished in 1852, and today interrogatories to an adverse party may be filed irrespective of his residence.[12] The original statute required that there should be annexed to the interrogatories an affidavit of the interrogating party, that he believed that he would derive some material benefit from the discovery sought, and that it was not sought for the purpose of delay.[13] Such an affidavit was not binding on the court on the issue of whether the interrogatories were material.[14] Such an affidavit is no longer required.

*Names of Witnesses*

The original statute of 1851 provided that a party should not be required to "disclose the names of the witnesses by whom, or the manner in which he proposes to prove his case." This has been changed so that the present law provides

> "but no party interrogated shall be obliged . . . to disclose the names of witnesses, except that the court may compel the party interrogated to disclose the names of witnesses and their addresses if justice seems to require it, upon such terms and conditions as the court deems expedient."[15]

In commenting, and criticizing, the earlier law F. W. Grinnell wrote:

> "If a party is to be allowed to withhold the names of persons on the ground that they are his witnesses, he should certainly be required to state that ground in his answer under oath and to produce the persons at the trial. Otherwise he is given the benefit of the statute without complying with it."[16]

Mr. Grinnell in his article suggests that the prohibition against disclosing the names of witnesses was inserted to prevent what may be called fishing expeditions; that it should not prevent asking the defendant the name of his teamster, who was involved

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[12] *Townsend* v. *Gibbs*, (1853), 65 Mass. (11 Cush.) 158.
[13] 1851, 233, s. 100.
[14] *Foss* v. *Nutting* (1860), 80 Mass. 484, 486.
[15] G.L., c. 231, s. 63.
[16] 16 H.L.R. 110, at 118.

in the accident in question; and should not prevent interrogation as to the names of actual participants in the transaction under judicial inquiry. As such they are more than potential witnesses, they are the actors rather than the audience.[16] The granting or refusal of an order to disclose names of witnesses ordinarily rests with the discretion of the trial court, and will not be reversed by the appellate court.[17]

*History of the Scope of Inquiry*

Prior to the amendment of 1909, a party could inquire "for the discovery of facts and documents material to the support (*or his case*) or (*his*) defense of the action.[18] Under these earlier statutes the right of inquiry by interrogatories was confined to the discovery of facts and documents material to the support of the contention affirmatively set up by the interrogator in his own pleadings.[19]

In 1909 the Legislature amended the law to allow "discovery of facts and documents admissible in evidence at the trial of the case", which is our present law.[20] This amendment was nullified by a decision in 1912, wherein the court ruled that since a party need not disclose "the manner in which, he proposes to prove his case", discovery was still confined as before, to the proof of his own case.[21] To overcome this decision, in 1913, the Legislature repealed all the old statutes as to interrogatories, and enacted a new law, in toto.[22]

Under the amendments of 1913, which, with minor changes are our present statutes, "the scope of the subjects about which interrogatories may be asked is as broad as the field of inquiry when the person interrogated is called as a witness to testify

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[16] 16 H.L.R. 110, at 118.

[17] *McNeil* v. *Middlesex & B. St. Ry. Co.* (1919), 233 Mass. 254, 123 N.E. 676.

[18] Parenthesis inserted; 1851, 233, s. 98; R.L., c. 173, s. 57.

[19] *Wilson* v. *Webber*, (1854), 2 Gray 558; *Wetherbee* v. *Winchester* (1880), 128 Mass. 293; *Davis* v. *Mills* (1895), 163 Mass. 481, 40 N.E. 852, holding that defendant could not ask plaintiff for the conversation between the parties, which made the contract, which was the subject of the suit.

Prior to the 1913 amendments a plaintiff could not force the defendant street railway to disclose the contents of a report of the accident, which had been made by its motorman. — *Spinney* v. *Boston El. Rwy. Co.* (1905), 188 Mass. 30, 73 N.E. 1021; *Grebenstein* v. *Stone & Webster* (1910), 205 Mass. 431, 91 N.E. 411.

[20] 1909, 225; G. L., c. 231, s. 61.

[21] *Looney* v. *Saltonstall* (1912), 212 Mass. 69, 98 N.E. 698.

[22] 1913, 815.

orally in the actual trial", with the restrictions against self-incrimination, the prohibitions against disclosure of title not material and against the disclosure of the names of witnesses contained in section 63.[23] But ". . . the right to interrogate is not a right to abridge the other party's right to try any doubtful fact. Still less is it a right to require him to offer an opinion on the general issue of the case, or to state his view of it."[24]

Without passing on particular questions, the court in ruling that a "stock set" of interrogatories were erroneously stricken from the record, said:

> "An adversary party when called as a witness, may be cross-examined."

and thus inferred, that subject to the discretion of the trial court, the scope of interrogatories is equally wide.[25] "A party has the privilege of framing his own interrogatories, and he should be careful to ask for what he wants. The party interrogated may answer the questions as they are propounded to him. He is not obliged to surmise that his opponent meant something different from that which he expressed."[26]

Except where otherwise expressly provided, the "fundamental rules as to the admission and exclusion of evidence define and limit interrogatories, with the possible exception that a party must report in his answers to interrogatories the results of his inquiry of his agents, servants and attorneys. He may be required "to state that which is hearsay and which he could not give as a witness testifying at trial."[27]

Under the earlier law, a next friend, who prosecuted an action for an insane person, could not be interrogated. He is not a party to the action.[28] This has been changed by statute, so that today a guardian or next friend must make the answers if the party himself is incompetent.[29]

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[23] 1913, 815; G.L., c. 231, ss. 61-67. *Cutter* v. *Cooper*, 1920, 234 Mass. 307, 125 N.E. 634; G.L., c 231, s. 63.

[24] Holmes, C.J., in *Robbins* v. *Brockton St. Ry. Co.* (1901), 180 Mass. 51, 61 N.E. 265, holding proper a refusal to order answered: "What caused the collision? State fully."

[25] *Goldman* v. *Ashkins* (1929), 266 Mass. 374, 165 N.E. 513.

[26] Qua, J. in *Karp* v. *Whiting Milk Co.* (1941), 308 Mass. 60, 30 N.E. 2d 828.

[27] *Warren* v. *De Coste* (1930), 269 Mass. 415, 169 N.E. 505.

[28] *Gray* v. *Parke* (1892), 155 Mass. 433, 29 N.E. 641; cf infra, note 47.

[29] G.L., c. 231, sec. 65.

The party interrogating cannot complain if he receives a responsive answer to his erroneously framed question. The classic example is the case where the plaintiff asked the defendant milk company how its horse was fastened "between deliveries", and received the answer that the horse and wagon were "not fastened".[30]

*Time for Filing*

Prior to 1909 a defendant could not interrogate prior to the filing of his answer.[31] Today, "any party, after the entry of a writ or the filing of a bill or petition, may interrogate an adverse party for the discovery of facts and documents admissible in evidence at the trial of the case."[32]

*Number of Interrogatories*

Section 61 of our Practice Act[33] provides that

> "No party shall file as of right more than thirty interrogatories, including interrogatories subsidiary or incidental to, or dependent upon, other interrogatories, and however the same may be grouped, combined or arranged; but for adequate cause shown the court may allow additional interrogatories to be filed."

Prior to this amendment in 1929, it was not unusual for parties to a motor vehicle action to file 100 or more mimeographed or printed interrogatories, "without any necessity for thought or labor with reference to the particular case in which such copy might be filed."[34] "If a set of interrogatories upon summary examination appears to include many irrelevant questions or to be expressed in crude form, or to be verbose or repetitious, it may be stricken from the files."[35] But, it is error to strike from the files a set of interrogatories because they are a "stock form", printed or mimeographed, and obviously not prepared for the particular case, if the questions asked are relevant.[35] And, when questions are well framed for the issues of a particular case, the

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[30] *Karp* v. *Whiting Milk Co.* (1941), 308 Mass. 60, 30 N.E. 2d 828.
[31] R.L., c. 173, s. 57; 1909, 225; *Looney* v. *Saltonstall*, ubi, supra.
[32] G.L., c. 231, s. 61.
[33] G.L., (Ter. Ed.), c. 231, s. 61.
[34] See: *Goldman* v. *Ashkins* (1929), 266 Mass. 374, 165 N.E. 153; See: 11 M.L.Q. No. 1, 41; 1929, 303.
[35] *Goldman* v. *Ashkins* (1929), 266 Mass. 374, 165 N.E. 153.

court usually will grant permission for their filing, even though they exceed thirty in number.

The Court has said that interrogatories which exceed thirty in number, and which are filed without leave of court, ought to be dismissed on motion.[36] But if more than thirty interrogatories are filed, wtihout leave, the trial court may order them answered. The order to answer is a ratification of the filing.[37]

Where there is more than one defendant, interrogatories may be addressed to one or to all of them.[38] But the answers of one defendant are not evidence against another defendant. "Answers to interrogatories in this respect stand upon the same footing as admissions or other statements made by third parties."[39]

Further interrogatories cannot be filed without leave of court.[40] The statute empowers the court to allow a motion for the filing of supplemental interrogatories. The language of Mr. Justice Hoar, when a judge of the court of common pleas, well expresses the rule applicable even today:

> "A plaintiff cannot, as a matter of right, file successive sets of interrogatories to a defendant, and require answers under oath. But the court will, as a matter of discretion, allow supplemental interrogatories to be filed, and require them to be answered, when new and unexpected facts are disclosed in the answers, or where, for some reason not involving neglect on the part of the interrogator, he has failed to obtain the information sought by his interrogatory."[41]

*Right to get Results of Investigation Made in Preparation for Trial*

A question which arises is whether a party can compel his adversary to disclose the facts which his adversary's attorney has learned as a result of investigation in preparation for trial. It has been contended by some practitioners that a party can obtain

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[36] *Bennett* v. *Powell* (1933), 284 Mass. 246, 189 N.E. 559.
[37] *Gill* v. *Stretton* (1937), 298 Mass. 343, 10 N.E. 2d 185.
[38] *Stetson* v. *Wolcott* (1860), 15 Gray (81 Mass.) 545.
[39] *McNiff* v. *Boston El Rwy.* (1919), 234 Mass. 252, 125 N.E. 391.
[40] *Wetherbee* v. *Winchester* (1880), 128 Mass. 293, holding that a party cannot be defaulted for failing to answer an interrogatory so filed. *Beauregard* v. *Capitol Amusement Co.* (1938), 16 N.E. 2d 672; c/f; *Gill* v. *Stretton*, supra, note 37.
[41] *Fowle* v. *Gardner*, 14 Law Reporter 456; approved in *Hancock* v. *Franklin Ins. Co.* (1871), 107 Mass. 113, 116.

the report of a medical examination conducted by the defendant. Such a contention is based on a 1940 decision, wherein it was ruled that a party could by interrogatory obtain the findings and report of an examining physician for a defendant life insurance company.[42]

But the examination by the physician in that case was part of the transaction resulting in the issue of the life insurance policy. As pointed out by the court, such a preliminary examination of an applicant for life insurance was required by our statutes. To apply the earlier criterion suggested by Mr. Grinnell's article, the physician in that case was an actor in the transaction.

In 1898 the Court questioned whether the results of an investigation would have to be disclosed in answer to an interrogatory.

> "Possibly, also, if an agent has investigated the matter, and has ascertained and reported the facts, the party interrogating may not be entitled to a discovery of them. It is not necessary, however, to decide that now."[43]

That a party cannot by interrogatories learn the results of his opponent's investigation after the accident is substantiated by a decision in 1930, wherein the Court said:

> "A large group of the interrogatories was designed to adduce from the plaintiff a detailed statement of the manner in which the accident occurred, together with all its attendant conditions. The answer made by the plaintiff to each of these was in substance the same, to the effect that touching those facts he had no personal knowledge; that so far as he had been able to ascertain none of his agents, servants or attorneys had such personal knowledge, and such information as he had derived wholly from statements made to him or his attorneys by third persons. Information thus obtained constituted pure hearsay. Upon elementary principles of evidence the plaintiff could not

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[42] *Gianelli* v. *Metropolitan Life Insurance Co.* (1940), 307 Mass. 18, 29 N.E. 2d 124.

[43] Morton, J. in *Gunn* v. *N.Y., N.H. & H.R.R.* (1898), 171 Mass. 417, 50 N.E. 1031.

rightly have been a competent witness to testify as to facts thus ascertained."[44]

*Interrogatories in Probate Proceedings*

In the redraft of 1913, the Legislature intended that the new law as to the scope, etc., of interrogatories should apply in the probate, and Land Court, as well as in the Superior Court,[45] and the revision of the General Laws in 1921 incorporated the change in Chapter 215, section 43. The words of that section are

> "Section 43. In any proceeding in the probate court, the petitioner or respondent may at any time after the filing of the petition file interrogatories in the registry of probate for the discovery of facts and documents *material to the support or defense of the proceeding.* All provisions of chapter 231 relative to interrogatories in civil action shall, so far as applicable, apply to such interrogatories . . .".

"*Material to the support or defense of the proceeding*" — Such language in the earlier statutes was the basis for the rule that a party could interrogate for the discovery of facts in support of his own case, but not for facts which supported the case of the opposing party. The next sentence that the provisions relative to interrogatories in civil cases shall "so far as applicable, apply to *such interrogatories*" hardly helps, since grammatically "such interrogatories" restricts the application to interrogatories of the type defined in the previous sentence.

As long as section 43 is allowed to remain as it now is, some litigant sooner or later is bound to maintain that discovery in probate is more limited than generally believed. The section should be amended by striking out the words: "material to the support or defense", and substituting therefor "admissible in evidence at the trial."[46]

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[44] Rugg, C.J., in *Warren* v. *DeCoste* (1930), 289 Mass. 415, 169 N.E. 505. See: *Carroll* v. *Boston El. Ry.* (1909), 200 Mass. 412, 86 N.E. 793, under the law, prior to the 1913 amendment. "The defendant was not compelled . . . to disclose in advance its theory of the accident, or to state facts derived from investigation, upon which it relied to establish its defense."

[45] 1913, 815, s. 8: "Section 8. The provisions of this act shall apply to proceedings in the land court, and to interrogatories filed in the probate court under the provisions of sections 41 and 42 of chapter 162 of the Revised Laws."

[46] See: *Wilson* v. *Webber*, 2 Gray 558, 561 discussed supra, notes 11, 19; cf: *Moore* v. *Stoddard* (1910), 296 Mass. 395; 92 N.E. 502.

In a petition for probate of a will, the petitioner and the contestant may interrogate each other.[47] But a beneficiary under the will, who files an appearance in support of the petition for probate, without being made a party by a court order, is not such an adverse party, and probably cannot be interrogated by written interrogatories.[48]

*Interrogatories to Corporation*

Section 65 of the present practice act provides that if a corporation is a party, the adverse party may by interrogatories examine "the president, treasurer, clerk or a director, manager or superintendent, or other officer thereof, as if he were a party." Similarly when a municipal corporation is a party, the mayor or certain other designated officers may be examined.

In 1871 the Court said:

> "The other five interrogatories do not appear to call for any official information from Byrnes, as president or secretary of the company, and apparently inquire as to his personal knowledge of such facts as he could only state as a witness on the stand, or in a deposition. The court are of opinion that the plaintiff is not entitled to have them answered."[49]

The rule of this case was approved in 1898, when the Court said:

> "In the case of an officer of a corporation the information must be official; that is, derived through his connection with the corporation."[50]

In a suit against the Adams Express Company the plaintiff alleged it was a corporation, and filed interrogatories to an alleged officer of the defendant. They were not answered, the defendant contending that it was not a corporation. When the plaintiff did not prove to the satisfaction of the trial judge that the defendant was a corporation, the judge refused to order answers to the interrogatories. On exception, the order was sus-

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[47] *Moore* v. *Stoddard* (1910), 206 Mass. 395, 92 N.E. 502.
[48] *Old Colony Trust Co.* v. *Wallace* (1912), 212 Mass. 335, 98 N.E. 1035.
[49] *Hancock* v. *Franklin Ins. Co.* (1871), 197 Mass. 113, 115.
[50] *Robbins* v. *Brockton St. Ry. Co.* (1901), 180 Mass. 51, 61 N.E. 265. Exception to failure to order answer sustained.

tained. The rule will hold today when there is a denial that a party is a corporation.[51]

The president of a corporation must answer interrogatories even though he have no personal knowledge of the facts elicited, if they can be learned by him from the corporation's files, or from its agents or attorneys. And the error in not ordering the president to answer such pre-trial interrogatories is not cured by evidence introduced at the trial.[52]

"The president stands in the place of the corporation . . ., and the corporation, being reputed to have done whatever its servants did in the course of their employment, is supposed to know what they did, and . . . cannot shelter itself under a general profession of personal ignorance on the part of its president."[53]

The corporation officer must disclose information in the company's files, even though the agent supplying it is no longer in the employ of the corporation.[53]

The answer to the interrogatory by an officer "is the act of the corporation. If he seeks to conceal any material fact, the corporation and not he alone is the guilty party."[54]

### *Answers to Interrogatories*

Until 1913 the party interrogated "may introduce into his answer any matter relevant to the issue to which the interrogatory relates."[55] The original act of 1851 provided that "the party interrogated may introduce into his answer any matter explanatory of his admissions or denials if relevant to the interrogatory which he is answering, but not otherwise."[56] These earlier provisions, and the cases thereunder, were of importance where the parties to the litigation could not take the witness stand to explain or qualify the admissions which they had made in answer to an interrogatory.[57]

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[51] *Gott* v. *Adams Express Co.* (1868), 100 Mass. 300; G.L., c. 231, s. 30, prior to this statute the issue of the defendant's incorporation was raised by a general denial.

[52] *Gunn* v. *N.Y., N.H. & H.R.R.* (1898), 171 Mass. 417, 50 N.E. 1031; *Toland* v. *Paine Furniture Co.*, (1901), 179 Mass. 501, 61 N.E. 52.

[53] *Giannelli* v. *Metropolitan Ins. Co.* (1940), 307 Mass. 18, 29 Fed. 2d 124.

[54] *Harrington* v. *Boston El. Ry.* (1913), 214 Mass. 563, 101 N.E. 977.

[55] R.L., c. 173, sec. 60, repealed by 1913, 815, s. 9.

[56] 1851, 233, s. 104.

[57] See: F. W. Grinnell, "Discovery in Mass.," Part II, 16.

Since the amendments of 1913, the rule of *Baxter* v. *Massasoit Insurance Company* may be subject to question or qualification.[58] In that case, the court granted a new trial because part of an answer to an interrogatory had been stricken by the trial court as not responsive to the question asked. There the plaintiff asked the defendant whether Reed and Brother were its agents, to which it expected and received affirmative answers, and then asked:

> "Int. 3. State whether or not the defendants, or their said agents, Reed and Brother, in the year 1863 filled out a policy of insurance purporting to be in favor of the plaintiff, on a house in West Newton, for $1000. Answer this question without stating whether such policy was delivered or not, or whether the same took effect as a contract."

The defendant answered that such a policy was made out by Reed and Brother, but that the defendant had never been notified of it, and the policy had not been delivered. The expunging of the latter part of this answer was held reversible error.

The fact that a party answers an improper interrogatory, is not a waiver of his right to object to another improper interrogatory on the same subject.[59]

An interesting question arises as to interrogatories asking for conversations with a deceased person, in view of the statute which makes them admissible only when made "in good faith before the commencement of the action and upon the personal knowledge of the declarant."[60]

> "In any case where the answers are upon information and belief, it may be so stated. But an admission is none the less binding because made upon information and belief; and for that reason the party interrogating properly may insist that the party interrogated shall make reasonable inquiries of his servants, agents and attorneys who were engaged in the transaction in question, for the purpose of

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[58] *Baxter* v. *Massasoit Ins. Co.* (1866), 95 Mass. 13 Allen 320, 324, 1913, 815, ss. 2, 9.

[59] *Davis* v. *Mills* (1895), 163 Mass. 481, 40 N.E. 452.

[60] G.L., c. 233, s. 65; See: *Warren* v. *DeCoste* (1930), 269 Mass. 415; 169 N.E. 505.

ascertaining the facts in relation thereto, and answering accordingly."[61]

A party need not answer an interrogatory as to the contents of a public record, such as a death certificate, which is accessible to both parties.[62]

Where an action or defense is based on a written contract in the possession of a party, there is one case which makes it questionable whether the contract can be proved by an answer to an interrogatory. The question and answer are not given in the report and it would seem that the answer may not have been a complete copy of the insurance contract. The case has been criticized.[62a]

Answers to interrogatories are not binding on the party making the answers. Like other evidence they may be explained or contradicted by other evidence offered by him.[63] But a party who introduces the answers of his opponent in evidence in support of his case is bound thereby, in the absence of other evidence on the issue.[64]

Pressing for answers to interrogatories is not a waiver of a pending plea in abatement,[65] and placing a case on the trial list is not a waiver of the right to answers to interrogatories.[66]

"The penalty to be imposed for failure to answer interrogatories properly is to be determined by the sound discretion of the trial judge."[67]

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[61] Morton, J, in *Gunn* v. *N.Y., N.H. & H.R.R.* (1898), 171 Mass, 417, 50 N.E. 1031.

[62] *Warren* v. *DeCoste* (1930), 269 Mass. 415, 169 N.E. 505.

[62a] *Hope Mutual Life Ins. Co.* v. *Chapman*, (1856), 72 Mass. (6 Gray) 75; See 16 H.L. Rev. at 196; cf: *Clarke* v. *Warwick Cycle Co.*, (1899), 174 Mass. 434, 54 N.E. 887, "admissions are evidence against the party making them, although they relate to the contents of a written paper or to a corporate note." *Hyde* v. *Pierce*, (1883), 134 Mass. 260, 265, books of account.

[63] *Dome Realty* v. *Cohen* (1935), 290 Mass. 36, 194 N.E. 679.

[64] *Falzone* v. *Burgoyne* (1945), 317 Mass. 493. 58 N.E. 2d 751, see note 84 infra.

[65] *Beauregard* v. *Capitol Amusement Co.* (1938), 301 Mass. 142, 16 N.E. 2d 672.

[66] *Kennedy* v. *Gooding* (1856), 73 Mass. 79 Gray 417.

[67] *Sawyer* v. *Boyajian* (1936), 296 Mass. 215, 5 N.E. 2d 348; G.L., c. 231, s. 64; as to costs G.L., c. 231, s. 66; See: S.C. rule 36 which had failed in its purpose for lack of enforcement by the Court. It is suggested that it would be more workable, if such costs were taxed, either on removal of default or nonsuit, or in the final bill of costs in the judgment, rather than paid into court, as provided in said rule.

If answers are filed in good faith, it is error to enter a nonsuit or default against the party so answering, on the ground that the answers are incomplete. The correct procedure is to file a motion, setting forth the objection to the answers, and praying that they should be made more full and clear. The presiding judge must then determine and direct which of the interrogatories require further and fuller answers. And for the refusal or neglect of the party to make such further and fuller answers, a nonsuit or default may be entered.[68] Where the answers filed obviously are so defective as to amount to trifling with the order of court, a nonsuit or default may be entered, without the court again ordering further answers.[69]

The answers must be signed by the party. The court may, in its discretion, enter a nonsuit or default where answers signed by his attorney are filed. Whether such action is taken, or further time granted within which to answer is a matter for the discretion of the trial court.[70]

Where a party, in answer to an interrogatory asking for books and documents, refuses to exhibit the same, except pursuant to an order of the court, it was error for the court to nonsuit him without a further specific order to exhibit the books and documents.[71]

If an interrogatory contains improper matter, a party cannot be defaulted under a general order to make further answers, for an imperfection in his answers, without a specific order of the court as to the particulars in which his answers, made in good faith, are insufficient, and an opportunity to amend them. He is not required to take the risk of separating the good from the bad.[72]

If a person refuses to answer an interrogatory, his reasons therefor must be stated under oath, as, for instance, that the interrogatory calls for the names of witnesses.[73] And the refusal

[68] *Amherst R.R.* v. *Watson* (1857), 74 Mass. 8 Gray 529; *Wetherbee* v. *Winchester* (1880), 128 Mass. 293; *Fels* v. *Raymond* (1885), 139 Mass. 98, 28 N.E. 691; *Hooton* v. *Redmond* (1921), 237 Mass. 508, 130 N.E. 107.

[69] See: *Hooton* v. *Redmond* (1921), 237 Mass 508, 130 N.E. 107; cf: *Nickerson* v. *Glines* (1915), 220 Mass. 333, 107 N.E. 942 (failure to file complete particulars as ordered).

[70] *Harding* v. *Noyes* (1878), 125 Mass. 572.

[71] *Amherst etc. R.R.* v. *Watson* (1857), 74 Mass. 8 Gray 529, 531.

[72] *Wetherbee* v. *Winchester* (1880), 128 Mass. 293, 295.

[73] *Spinney* v. *Boston El. Ry.* (1915), 188 Mass. 30, 73 N.E. 1021; *Hobbs* v. *Stone* (1862), 87 Mass. 5 Allen 109.

to answer presents a matter of law for the court. It is not a legitimate basis for comment to the jury, nor can the refusal be read to the jury, at the trial.[74]

If a person in his answer to an interrogatory claims the privilege against self-incrimination, the claim of privilege is not conclusive on the court. The party claiming such a privilege must affirmatively show how he will be incriminated, and it is for the court to decide whether the claim of such privilege is well taken.[76] When a privilege is claimed, such claim of privilege must be made in the answer and under oath. Whether such claim or privilege can be read to the jury, apparently has not been decided, and may well depend on the type of privilege claimed.[76]

*Use at Trial*

> "The answers of a party to interrogatories filed may be read by the other party as evidence at the trial. The party interrogated may require the whole of the answers upon any one subject matter inquired of to be read, if a part of them is read; but if no part is read, the party interrogated shall in no way avail himself of his examination or of the fact that he has been examined."[77]

The original act of 1851 provided that "the party interrogated shall be entitled to require that the whole of the answers shall be read if any part of them shall be read." This was changed in 1852.[78] Under an earlier statute, it was ruled that "subject matter" is "not the particular fact covered by any one or more interrogatories, but the matter put in issue by the pleadings and thus inquired of."[79]

Where the interrogator makes reference to the substance of an answer to an interrogatory in the cross-examination of an employee of the defendant, the defendant can insist that all its answers on that subject be read in evidence, or may introduce all its answers to interrogatories on that subject. But if it does so

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[74] *Harrington* v. *Boston El. Ry.* (1913), 214 Mass. 563, 101 N.E. 977.
[75] *Hobbs* v. *Stone* (1862), 87 Mass. 5 Allen 107; *Greece* v. *Koukouras* (1928), 264 Mass. 318, 162 N.E. 345.
[76] See: *Worthington* v. *Scribner* (1872), 109 Mass. 487, refusal to order disclosure of name of informer to public authorities, of commission of crime.
[77] G.L., c. 231, s. 89.
[78] *Dernelman* v. *Burton* (1900), 176 Mass. 363, 57 N.E. 665.
[79] *Churchill* v. *Ricker* (1872), 109 Mass. 209, 211.

insist, the defendant cannot object to an argument made on the substance of his answer so introduced in evidence.[80]

It is reversible error for the attorney for the interrogating party to read to the jury the refusal of the other party to answer unless ordered to do so by the court. When it is asserted in an answer that an interrogatory is improper, it presents a question of law for the court, and the refusal to answer on such grounds is not a proper basis for argument or comment to the jury.

> "Right or wrong, his refusal to answer was a matter for the court and for the court alone; it was not a matter for the consideration of the jury, much less one from which the jury ought to have been allowed to draw any inference of fact."[81]

But aside from such questions of law, where answers are not direct, and responsive to the questions, such evasiveness may be a basis for inferring that a direct answer would have been against the interest of the interrogated party, and such evasion in itself, and the inferences to be drawn therefrom, may be sufficient evidence, on the issue covered by the interrogatories, to take the case to the jury, and defeat a motion for a directed verdict.[82]

The rule that, "the failure of a party in the face of evidence adverse to his interests to testify as to matters within his knowledge may be regarded as conduct in the nature of an admission, becomes inapplicable" when a party has fully set forth his version of the accident in his answers to interrogatories, and the answers have been put in evidence.

> "Merely because a party has answered interrogatories may not be enough in all cases to avoid the adverse inference from failure to give testimony on the witness stand."[83]

In that case, the answers fully covered the subject, and had been put in evidence.

A party, who introduces in evidence his opponent's answers to interrogatories, may by other evidence contradict the answers. But in the absence of such contradiction, he is bound by his

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[80] *Freeman* v. *United Fruit Co.* (1916), 223 Mass. 300, 111 N.E. 789.
[81] *Harrington* v. *Boston El. Ry.* (1913), 214 Mass. 563, 101 N.E. 977.
[82] *D'Addis v. Hinckley Rendering Co.* (1913), 213 Mass. 465, 100 N.E. 647.
[83] *Bresnick* v. *Heath* (1935), 292 Mass. 293, 198 N.E. 175.

opponent's answers, which he has so introduced.[84] When the answers, thus introduced, are contradicted by other evidence, it is "for the jury to determine the facts upon the conflicting testimony."[85]

A party has the right to introduce all his answers bearing on a subject, when his opponent introduces any of his answers to interrogatories bearing on that subject. But where he has made a clearly improper answer, the trial judge may exclude it, even though his adversary neglected to move to expunge his improper answer before trial.[86] But if improper answers are required of a party, pursuant to an order of court, it is reversible error, if they are used as a basis for cross-examination, even though the answers are not introduced in evidence.[87]

It is not a legitimate argument to a jury that a party could, had he tried, obtained the names of witnesses through interrogatories.[88]

*Appeal*

The correct method of obtaining appellate review of the order made by the Superior Court in relation to interrogatories is by exceptions.[89]

> "The principle of trial evidence to the effect that ordinarily no exception will be sustained to the refusal to allow a question to be put unless the substance of the answer expected in reply is stated to the court, does not apply to interrogatories. . . . On the other hand, exceptions ought not to be sustained unless there is a solid foundation for belief that substantial injury has resulted. Interrogatories should not be suffered to become a training field for the saving of exceptions possessing only a theoretical merit

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[84] *Minihan* v. *Boston Elevated Ry.* (1908), 197 Mass. 267, 83 N.E. 871; *Boudreau* v. *Johnson* (1922), 241 Mass. 12, 134 N.E. 359; *Washburn* v. *Owens* (1927), 258 Mass. 446, 155 N.E. 432; *Slamin* v. *N.Y., N.H. & H.R.R.* (1933), 282 Mass. 590, 185 N.E. 353; *Falzone* v. *Burgoyne* (1945), 317 Mass. 493, 58 N.E. 2d 751.

[85] *Woodman* v. *Powers* (1922), 242 Mass. 219, 136 N.E. 352; *Washburn* v. *Owens* (1927), 258 Mass. 446, 155 N.E. 432.

[86] *Bradley Lumber Co.* v. *Cutler* (1925), 253 Mass. 37, 148 N.E. 101; *Falzone* v. *Burgoyne* (1945), 317 Mass. 493, 58 N.E. 2d 751.

[87] *Wakely* v. *Boston Elevated Ry.* (1914), 217 Mass. 485, 105 N.E. 436.

[88] *Delaney* v. *Berkshire St. Ry. Co.* (1913), 215 Mass. 591, 102 N.E. 901.

[89] *Cutter* v. *Cooper*, 1920, 234 Mass. 307, 125 N.E. 634; By report, see: *Goldman* v. *Ashkins* (1929), 266 Mass. 374, 165 N.E. 513; By appeal, not correct: *McNeil* v. *Mdsx. etc. Ry. Co.* (1919), 223 Mass. 254, 123 N.E. 677.

having no relation to the practical administration of justice."[90]

When interrogatories are apparently irrelevant, an order expunging them will not be reversed. In such case it is a matter for the discretion of the trial court. The right to put the questions depends on the state of the case when the court's decision was made.[91] And, if the court orders answers to an immaterial interrogatory, it is not reversible error, if no harm is done.[92]

Generally, a party has not an absolute right to insist that a nonsuit or default, as the case may be, should be entered against his opponent. The refusal to enter such an order rests in the judicial discretion of the trial court, and does not present a question for appellate review.[93] When the plaintiff was merely a nominal party, and could not be found to answer interrogatories, the court refused to nonsuit the plaintiff. This was not error, but an exercise of discretion. And if the defendant let the case go to trial without his answers, and without objection he had no exception.[94] But where on similar facts, the court entered a nonsuit, the plaintiff had no valid exception.[95]

If the trial court erroneously refuses to order an interrogatory to be answered, the error is not cured by the introduction, or by the opportunity to introduce, evidence on the same point at the trial. A party has a right to have an answer to proper interrogatories before trial.[96]

While a party has a right to have his proper interrogatories answered before trial, it would seem that the failure to obtain answers does not become reversible error until he is ordered to trial without his answers, or the court by order refuses to direct their being answered. Thus a refusal by the court to nonsuit a plaintiff for failure to answer interrogatories is not reversible

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[90] Rugg, C. J., in *Cutter* v. *Cooper*, 1920, 234 Mass. 307, 135 N.E. 634.

[91] *Elliott* v. *Lyman* (1861), 3 Allen (85 Mass.) 110.

[92] *Todd* v. *Bishop* (1884), 136 Mass. 386; cf. *Wakely* v. *Boston Elevated*, supra, n. 87.

[93] *Sawyer* v. *Boyajian* (1936), 296 Mass. 215, 5 N.E. 2d 348; *Gill* v. *Stretton* (1937), 298 Mass. 342, 10 N.E. 2d 185.

[94] *Stern* v. *Filene*, 1867, 96 Mass. (14 Allen) 9. Many states by statute allow discovery against the true party in interest, though he is not a party of record. See: 44 H.L.R. 633, 634 n. 8.

[95] *Harding* v. *Morrill* (1884), 136 Mass. 291.

[96] *Gunn* v. *N.Y., N.H. & H.R.R.* (1898), 171 Mass. 417, 421; 50 N.E. 1031; *Baker* v. *Carpenter* (1879), 127 Mass. 226, overruling obiter dicta to contrary in *Sheron* v. *Lowell*, 104 Mass. 24.

error. It is a matter of discretion at the particular time, but it would have been error to force the defendant to trial without answers to his proper interrogatories.[97]

### *Use in Other Suits*

Answers to interrogatories may be used, as admissions, in another suit,[98] and, a fortiori, an amendment to a declaration does not prevent the use of answers to interrogatories filed before the amendment.[99]

### *Conclusion*

Pre-trial discovery has gone a long way in Massachusetts since the time when parties to litigation were not competent to take the witness stand. There, as in many other fields, we were pioneers and leaders in reform.

But sometimes the pioneering of Massachusetts, in retrospect, seems like a sprint in the early part of a race. Since then other jurisdictions have gone ahead of us. New York allows the examination of the opposite party by oral testimony before trial. In others the right to deposition from witnesses has been widened, so that the testimony of any witness may be taken and preserved irrespective of his probable availability at the trial.

In 1921 the Judicature Commission recommended the passage of legislation to provide for the oral examination of parties before trial.[100] It is a subject which deserves careful consideration, particularly when we consider the delays due to congested dockets which existed shortly prior to the last war, and also consider the problems of trials in a metropolitan area, where the trial before twelve good men and true, is not a trial before neighbors, as it was when the country was more rural.

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[97] *Stern* v. *Filene* (1867), 96 Mass. 14 Allen 9, supra, n. 94.

[98] *Williams* v. *Cheney* (1855), 70 Mass., 39 Gray 215, 220; See: F. W. Grinnell, supra, 16 H.L.R. at 197, for discussion of possible procedure to prevent such use.

[99] *Weatherly* v. *Brown* (1871), 106 Mass. 338.

[100] 1921, House Doc. 1205, pp. 110, 151; 1919, 223.

## The New Federal Tax Law

While its effect in temporarily reducing federal taxes is important the most important aspect of the new law from the point of view of the bar is in the change to a fairer and more reasonable incidence of federal taxes in various directions.

First, as predicted in the discussions during the past six or eight months, the provision permitting a joint return by married persons and the splitting of the income tax between them on such a return does away with the discrimination previously existing under the law as between the community property states and the other states and the agitation in favor of changing our whole system of property for the purpose of escaping such discrimination will cease, because the professed object of that agitation has been accomplished by this act.

Second, the community property states were complaining of the operation of the federal tax law of 1942 in relation to federal or state taxes and gift taxes under their property systems. This new act deals with that problem.

Third, the changes in regard to estate and gift taxes are such that family advisors and their clients will consider seriously rearrangements of any "estate planning" which they may have already done or contemplate in future. Without professing to have studied the act carefully we believe that these changes may also have the public benefit of releasing funds for investment purposes needed for the present and future business welfare of the nation —funds which heretofore have been taken in taxes and thus destroyed so far as their productive use as a national asset was concerned.

These advantages will remain even if taxes are raised again.

We had hoped to obtain an article from someone specially familiar with federal taxes which would be of assistance to the bar in studying and advising under this new act but the time was too short. We may perhaps be able to secure such an article for the next issue. In the meantime, we are to have a practical discussion on the subject as part of the Massachusetts Lawyers Institute at Swampscott, led by a careful student of the act.

F.W.G.

## Representative Town Meetings — Should Town Employees be Eligible?

*Introductory Note*

This question has been raised from time to time in different towns and we have been asked to discuss it. The practical reason for the discussion seems obvious. In Washington the army of government employees is said to be the most powerful "pressure group". We understand that in some towns there appear to be political "blocks" of town employees whose primary interest may be somewhat more personal than public. Those actively connected with representative town meetings will know to what extent that is true in any particular town. Obviously it may be true, and the question is whether a town should be given authority to provide that public employees should be ineligible. Is there anything in the constitution to prevent the legislature from giving that authority if it considers it advisable? We submit that there is not. (Compare G.L. c. 39, ss. 7-8).

The ninth article of the Bill of Rights provides that "all the inhabitants—having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." As pointed out in the *Opinion of the Justices*, 138 Mass. 601, this article does not limit the power of the legislature "to prescribe the qualifications of all officers and servants *not* provided for in the constitution." A "representative town meeting" is simply a form of "representative" "municipal" government and subject to reasonable regulations similar to the legislative regulation of cities under Article IV of Chapter I of the Constitution.

We suggest that section 5 of Chap. 43A of the Gen. Laws be amended by inserting a provision that a town may, by its by-laws, make town employees ineligible as town meeting members.

It is generally forgotten that the most careful study of the "representative town meeting" idea and its legal history in Massa-

chusetts from the beginning of the 19th century, is to be found in the addresses of the late Arthur Lord, former president of the Massachusetts Bar Association and, for some years, moderator of the town of Plymouth; and of Mr. Alfred Chandler of Brookline, at the annual meeting of the Massachusetts Bar Association in 1918. These addresses may be found in the "Quarterly" for February, 1919 (Vol. IV, No. 3, pp. 49-92). They were reprinted in pamphlet form at the time and were in considerable demand in different parts of the commonwealth so that they became a part of the history of the movement in favor of this form of town government for the larger towns. The story is recommended to those interested in town governments. Incidentally it is one of the many answers to those uninformed cynics who are constantly saying that "bar associations never do anything".

Since dictating the foregoing note we have received a most thorough study of "Representative Town Meetings" from Mr. Alexander Lincoln, formerly assistant attorney-general, which supplements the studies of Messrs. Lord and Chandler, of the history of the subject for the guidance of the bar and of town meeting members. We take pleasure in printing it.

F.W.G.

# Some Notes on Representative Town Meetings

By Alexander Lincoln

(Prepared in 1942 with particular application to the town of Brookline)

## 1. TOWN EMPLOYEES AS TOWN MEETING MEMBERS

### *The Legislature has Power to Fix Qualifications for Town Meeting Members*

Two views are possible concerning the character of the limited town meeting form of government: first, that it is direct and the town meeting members vote as individuals in their own right, the number of inhabitants having that right being restricted; second, that it is representative and the town meeting members vote as deputies. It is clear that in the opinion of our court the second view alone is tenable. In *Opinion of the Justices*, 229 Mass. 601, a proposed general statute authorizing towns to adopt a limited town meeting form of government was held unconstitutional for the reason that it would destroy the essential characteristic of the town meeting form of government, which is direct, by substituting a representative form, and the power of the General Court to erect such a government was subject to the restrictions of the 2d Amendment. The opinion states the fundamental distinction between the town and the city organization to be that "in the former all the qualified inhabitants meet together to deliberate and vote as individuals, each in his own right, while in the latter all municipal functions are performed by deputies. The one is direct, the other is representative." It holds that in that respect the limited town meeting form is in the latter class. "It is an immaterial circumstance that in the proposed bill the name 'town' is retained as descriptive of the municipal organization. It is the substance of the thing done, and not the name given to it, which controls. It is plain that the proposed bill extinguishes the essential characteristic of the town form of government as universally understood, and sets up in its place in certain respects a kind of representative form of government. . . . To call the municipal organization established by the proposed bill, 'town,' cannot modify its essential governmental nature."

The 70th Amendment, adopted many years later as an amendment to the 2d Amendment, authorizes the General Court

to establish "a form of town government providing for a town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town subject to such restrictions and regulations as the General Court may prescribe." This did not affect the conclusion reached in *Opinion of the Justices,* 229 Mass. 601. The authority of that opinion remains unimpaired. *Fitzgerald* v. *Selectmen of Braintree,* 296 Mass. 362, 366; *Moore* v. *Election Commissioners of Cambridge,* 309 Mass. 303, 323.

Town meeting members are elected representatives of the inhabitants of the town. They "meet, deliberate, act and vote in the exercise of the corporate powers of the town." Their powers are legislative, closely resembling the powers of the city council of a city. See G. L. c. 39, sec. 1; c. 43, sec. 3. The position which they hold is referred to in the standard form statute (G. L. c. 43A, secs. 2, 4) as an "office." It would seem scarcely open to doubt that it is a public office, within the definition given in *Attorney General* v. *Drohan,* 169 Mass. 534, 535, that a public office "is one whose duties are in their nature public, that is, involving in their performance some portion of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interested, either as members of the entire body politic, or of some duly established division of it," and that it is not either a private office on the one hand (see *Attorney General* v. *Drohan, supra)* or a public employment on the other (see *Brown* v. *Russell,* 166 Mass. 14, 25-26; *Attorney General* v. *Tillinghast,* 203 Mass. 539, 543-544; *Opinion of the Justices,* 303 Mass. 631, 637-638). Town meeting members may be public officers although under the statute (G. L. c. 43A, sec. 5) they receive no compensation. A public officer has no implied right to compensation. *McHenry* v. *Lawrence,* 295 Mass. 119, 120. Many public officers serve without pay. Whether town meeting members should be sworn may be a serious question. See G. L. c. 41, sec. 15 and sec. 107 as amended by St. 1927, c. 18; *Briggs* v. *Murdock,* 13 Pick, 305, 316-317, *Howard* v. *Proctor,* 7 Gray, 128, 131.

The important question for discussion, however, is not whether the office of town meeting member is a public office, but whether it is an office or position the qualifications for which can be fixed by the General Court.

Legislative power over offices provided for in the Constitution is restricted by Article 9 of the Declaration of Rights, which provides that "all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." But this article does not limit the power of the General Court to fix reasonable qualifications for offices not provided for in the Constitution. In that respect Article 4 of Chapter 1, Section 1, governs, which confers upon the General Court full power and authority to make all manner of wholesome and reasonable laws not repugnant to the Constitution, and more specifically to provide for the naming and settling of all civil officers not provided for in the Constitution and to set forth the duties, powers and limits of such officers. It is said in *Opinion of the Justices*, 138 Mass. 601, 603, that "In the exercise of this power the Legislature has the right to prescribe the qualifications of all officers See to the same effect *Opinion of the Justices*, 165 Mass. 599, 600-602; *Brown* v. *Russell*, 166 Mass. 14, 17; *Graham* v. *Roberts*, 200 Mass. 152, 156-157; *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 77; *Opinion of the Justices*, 240 Mass. 611, 613-615; *Wood* v. *Election Commissioners of Cambridge*, 269 Mass. 67, 69-70; *Moore* v. *Election Commissioners of Cambridge*, 309 Mass. 303, 314-317.

With reference to the extent and limitations of legislative power over offices the rule has been stated in these words: "Where an office is created by statute, the tenure, the mode of appointment, the qualifications required, the duties of the office, and the compensation, are wholly within the control of the Legislature, unless there is some limitation put upon the Legislature by the Constitution; and the statute creating the office may be altered or repealed by the Legislature at any time. But if the tenure of an office and the mode of appointment are prescribed by the Constitution, the Legislature cannot change them, unless the Constitution gives the Legislature authority to do so. If the qualifications for the office are prescribed by the Constitution, the Legislature cannot change them. If the qualifications are not prescribed by the Constitution, although the tenure and mode of appointment are, there has been some question whether the Legislature can prescribe the qualifications, but the solution of this question in any particular case depends upon the construction of the particu-

lar clauses of the Constitution involved, as well as of the whole frame and purport of the Constitution." *Opinion of the Justices,* 165 Mass. 599, 601-602. And in *Opinion of the Justices,* 240 Mass. 611, 614, holding constitutional a proposed bill requiring that district attorneys should be members of the bar, it was said; "The right of all persons equally to be selected for public employment in instances where the Constitution does not establish the qualifications is subject to reasonable regulation by the Legislature as to qualifications."

Is a town meeting member an officer whose office is provided for in the Constitution, in such a sense that the General Court is without power to prescribe qualifications for the office? The only reference to such an officer is in the 70th Amendment, authorizing the General Court to establish a form of town government in which the powers of the town shall be exercised by a limited number of elected inhabitants. Nothing is there said about their qualifications, but the General Court is given power to prescribe restrictions and regulations apparently governing both their election and their subsequent action.

The constitutional basis for the representative town meeting government is the 2d Amendment, either as amended by the 70th Amendment or otherwise. Such a government is a "municipal or city government" as that term is used in the 2d Amendment. *Opinion of the Justices,* 229 Mass. 601, 610. Municipal corporations are not established by the Constitution, but power over the subject is vested in the Legislature by the 2d Amendment and by the constitutional grant of power to make wholesome and reasonable laws. *Weymouth & Braintree Fire District* v. *County Commissioners,* 108 Mass. 142, 144; *Commonwealth* v. *Plaisted,* 148 Mass. 375, 386-387; *Graham* v. *Roberts,* 200 Mass. 152, 154; *Sullivan* v. *Lawson,* 267 Mass. 438, 439-440; *Moore* v. *Election Commissioners of Cambridge,* 309 Mass. 303, 314-317. There is no constitutional restriction upon the power of the General Court to fix the qualifications of officers of municipal governments erected under the 2d Amendment. *Graham* v. *Roberts,* 200 Mass. 152, 156; *Moore* v. *Election Commissioners of Cambridge,* 309 Mass. 303, 315.

We must conclude, therefore, that the power of the General Court to fix the qualifications of town meeting members is not

limited by the Constitution whether or not that power may be considered to be expressly granted by the 70th Amendment.

If the position of a town meeting member is not to be regarded as a public office, the regulatory power of the General Court under Article 4 of Chapter 1, Section 1, and the 2d and 70th Amendments, is no less comprehensive. The power extends to all cases of offices and positions in which the public have an interest, except offices provided for in the Constitution. *Opinion of the Justices,* 138 Mass. 601, 603. Thus positions and employments may be classified and appointments regulated under the civil service law. *Opinion of the Justices,* 138 Mass. 601; *Brown* v. *Russell,* 166 Mass. 14, 17-18, 25-26; *Opinion of the Justices,* 303 Mass. 631, 637-641; Membership in a political committee may be regulated although it is not a public office. *Attorney General* v. *Drohan,* 169 Mass. 534, 535-536. Licenses may be required as a condition of doing many kinds of business. See *Wyeth* v. *Cambridge Board of Health,* 200 Mass. 474, 478; *Commonwealth* v. *Beaulieu,* 213 Mass. 138; *Lawrence* v. *Board of Registration in Medicine,* 239 Mass. 424, 428-429; *Liggett Drug Co. Inc.* v. *License Commissioners of North Adams,* 296 Mass. 41, 49-51. The position of a town meeting member not being an office provided for in the Constitution, in the sense already discussed, the legislative power to prescribe reasonable qualifications must be extensive enough to cover it, even if it is not a public office.

### *Some Restriction or Regulation of the Right of Town Employees to Serve as Town Meeting Members would seem to be Reasonable and Advisable*

A public office is a public trust and is held for the benefit of the public. It is said in *Brown* v. *Russell,* 166 Mass. 14, 25: "Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not the profit, honor, or private interest of any one man, family or class of men. In our form of government it is fundamental that public offices are a public trust, and that the persons to be appointed should be selected solely with a view to the public welfare." And again in *Ashley* v. *Three Justices of the Superior Court,* 228 Mass. 63, 73, it is said of a public office that "It is a public trust, to be held and administered entirely and absolutely for the benefit and in the interest of the people." Article 5 of Part

1 of the Massachusetts Constitution declares: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive or judicial, are their substitutes and agents, and are at all times accountable to them."

The relation of a public officer to the public is fiduciary and the usual rules which govern such relationships apply. See *United States* v. *Carter*, 217 U.S. 286, 306. One of these rules is that persons in a fiduciary relation are not permitted in the performance of their duties to put themselves in a position antagonistic to the interests of those whom they represent. *Quinn* v. *Burton*, 195 Mass. 277, 279; *Ball* v. *Hopkins*, 268 Mass. 260, 266; *Anderson* v. *Bean*, 272 Mass. 432, 448. A particular application of this rule to holders of public offices is the principle of incompatibility of offices, which disqualifies the incumbent of an office from holding another office or position where there is an inconsistency of duties or a conflict of interests. *Gaw* v. *Ashley*, 195 Mass. 173, 176-177; *Barrett* v. *Medford*, 254 Mass. 384; *Attorney General* v. *McHenry*, 262 Mass. 127, 132; *Wood* v. *Election Commissioners of Cambridge*, 269 Mass. 67; *Opinion of the Justices*, 307 Mass. 613, 620.

Clearly such an inconsistency or conflict exists where a town meeting member is also a town employee, in all matters relating to appropriations for the department in which such member is employed or to his compensation as such employee. The case of a member of a city council is closely analogous, with respect to which G. L. c. 39, sec. 8, provides: "No member of the city council shall, during the term for which he was chosen, . . . be eligible to any office the salary of which is payable by the city." It cannot be doubted that a similar provision with respect to town meeting members would not be open to attack as an unreasonable exercise of legislative power.

If it should be thought that such a measure would be unnecessarily restrictive, a possible alternative would be a provision forbidding a town meeting member who is also a town employee to vote on any matter in which he has an interest as such employee. Such a provision would merely give effect to the principle that

a fiduciary cannot avail himself of his position to gain a personal advantage. *Gay* v. *Gay*, 5 Allen, 181; *Bowen* v. *Richardson*, 133 Mass. 293, 296; *Hayes* v. *Hall*, 188 Mass. 510, 511; *Witherington* v. *Nickerson*, 256 Mass. 351, 357; *Anderson* v. *Bean*, 272 Mass. 432, 448. It would be analogous to the rules of both branches of the Massachusetts Legislature (Senate Rule 10; House Rule 63) substantially to the effect that no member shall vote upon any question where his private right, distinct from the public interest, is immediately concerned. As a regulation of the office its constitutionality would not be open to doubt. See *Taft* v. *Adams*, 3 Gray, 126, 130; *Graham* v. *Roberts*, 200 Mass. 152, 156-157; Amendments to the Constitution, Article 70.

It is not the purpose of this memorandum to discuss the comparative merits of a measure excluding town employees from town meeting membership and a measure limiting their right to vote. It is suggested merely that as a practical matter the latter might prove to be cumbersome in its application.

If legislation is to be sought, so far as concerns towns which have adopted the standard form of representative town meeting government without doubt it should take the form of an amendment to G. L. c. 43A. That statute by its terms is limited in its application to towns in which a form of representative town meeting government has already been established under a special statute, for the reason that, as in the analogous case of city governments, under the terms of both the 2d and the 70th Amendment legislation must first be applied for and granted by special statute and accepted in conformity with the provisions of those amendments, and a general statute is valid only when limited to municipalities which have accepted a special statute. *Opinion of the Justices*, 229 Mass. 601; *Fitzgerald* v. *Selectmen of Braintree*, 296 Mass. 362, 366.

Where a special statute has once been enacted and accepted pursuant to constitutional requirements, that statute may be amended, or the form of government may be changed by general legislation, and again amended, without any provision for application and acceptance as provided by the Constitution, or,

indeed, any provision for approval by the municipalities which have accepted it. See *Chandler* v. *Boston*, 112 Mass. 200; *Larcom* v. *Olin*, 160 Mass. 102, 104; *Cunningham* v. *Mayor of Cambridge*, 222 Mass. 574, 576; *Moore* v. *Election Commissioners of Cambridge*, 309 Mass. 303, 316. But it is not uncommon to provide that an act shall take effect in any particular municipality only when accepted by the voters. See *Stone* v. *Charlestown*, 114 Mass. 214; *Prince* v. *Crocker*, 166 Mass. 347, 359-360; *Graham* v. *Roberts*, 200 Mass. 152, 157; *Cunningham* v. *Mayor of Cambridge*, 222 Mass. 574, 576-577; *Howes Brothers Co.* v. *Unemployment Compensation Commission*, 296 Mass. 275, 288. Many of the special acts authorizing towns to adopt a representative town government have been amended from time to time, and in only a few instances has there been any provision for acceptance. The Brookline act has been twice amended without such provision. St. 1931, c. 321; St. 1938, c. 405.

To conclude the discussion, it should be stated that any restriction or regulation deemed advisable may be prescribed by the General Court itself, either without conditions or subject to local approval, or power to make rules governing the subject may, it seems, be delegated to the town or town representatives. *Opinion of the Justices*, 138 Mass. 601; *Commonwealth* v. *Plaisted*, 148 Mass. 375; *Broadbine* v. *Revere*, 182 Mass. 598, 600-603; *Fitzgerald* v. *Mayor of Boston*, 220 Mass. 503; *General Outdoor Advertising Co., Inc.* v. *Department of Public Works*, 289 Mass. 149, 162-163; *Leahy* v. *Inspector of Buildings of New Bedford*, 308 Mass. 128, 131.

## 2. THE CONSTITUTIONAL STATUS OF TOWN MEETING MEMBERS AT LARGE

### *Brief History of the Representative Town Government Movement*

The increase in population in the towns of Massachusetts and the fluctuating character of town meeting attendance have led to increasing difficulties in conducting town meetings and growing dissatisfaction on the part of citizens, interested in town government, who have been unable, because of crowded conditions, to participate effectively in the meetings. Thus has arisen a demand for reform which has resulted in the development of the limited town meeting. In this movement Alfred D. Chandler, Esq., a distinguished citizen of Brookline for many years, was the leader, and he has been called the father of the limited town meeting project. See the address by Arthur Lord, Esq., entitled "The Representative Town Meeting in Massachusetts," and discussion, appearing in 4 Mass. Law Quart. 49, et seq. See also Report of the Special Commission, Senate No. 10 of 1931.

The first legislation providing for limited town meetings was a special act enacted in 1915, which authorized the town of Brookline to establish a limited town government (Spec. St. 1915, c. 250). It was planned by Mr. Chandler and has been called the Brookline experiment. It was followed in 1916 by a similar special act applicable to the town of Methuen (Spec. St. 1916, c. 116). At that time it was generally thought that the limited town meeting form of government was merely a modification of the traditional form, and that legislative authority to establish such a form was to be found in the power of the General Court to make all manner of wholesome and reasonable laws, and also the power under the 29th Amendment to provide for precinct voting. See 4 Mass. Law Quart. 67, 82-83, 86-89, 91. In the passage of both these acts, therefore, it seems that there was no attempt to comply with the requirements of the 2d Amendment with respect to application for legislation by majority vote, though both acts were conditioned on acceptance by majority vote and both were duly accepted.

In 1918, in *Opinion of the Justices,* 229 Mass. 601, the justices held that the establishment of the limited town meeting was subject to the restrictions of the 2d Amendment, necessitating applica-

tion to the General Court by majority vote and special legislation in response thereto. This was followed by *Attorney General* v. *Methuen,* 236 Mass. 564. That case was an information in the nature of a quo warranto to test the validity of a special act passed in 1917 (Spec. St. 1917, c. 289) purporting to grant to Methuen a city charter. The court held that the requirements of Article 2 of the Amendments had not been fulfilled in respect to the enactment either of Spec. St. 1916, c. 116, or of Spec. St. 1917, c. 289, and that the charter was invalid. The court, however, refused to issue the writ, but indicated that the obvious steps should be taken to remedy the situation. The case was decided on January 4, 1921.

Following these cases and evidently in consequence of them, in 1921 two special acts were passed, the first applicable to Brookline (St. 1921, c. 36) and the second to Methuen (St. 1921, c. 241), which were substantially reenactments of Spec. St. 1915, c. 250, and Spec. St. 1916, c. 116, respectively. Between 1919, after the opinion in 229 Mass. 601, and 1926, other towns had applied for and had been granted similar legislation, all presumably in compliance with the restrictions of the 2d Amendment. By the end of 1926 ten towns in all had adopted the limited town meeting system, one act having failed of acceptance.

The 2d Amendment gives the General Court "full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth," with the proviso "that no such government shall be erected or constituted in any town not containing twelve thousand inhabitants, nor unless it be with the consent, and on the application of a majority of the inhabitants of such town, present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose." This amendment was amended by the 70th Amendment, ratified in 1926, by adding thereto the following paragraph:

> "Nothing in this article shall prevent the General Court from establishing in any corporate town or towns in this Commonwealth containing more than six thousand inhabitants a form of town government providing for a town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town subject to such restrictions and regulations as the General Court may prescribe; provided, that such establishment be with the consent, and

on the application of a majority of the inhabitants of the town, present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose."

Nothing appears in the legislative records to indicate the purpose of the amendment, but it may be surmised that it was to afford relief to towns below the 12,000 limit of the 2d Amendment, whose number of qualified voters had been doubled by the advent of woman suffrage. A suggestion that such an amendment might be necessary was made in Mr. Lord's address, delivered in 1918. 4 Mass. Law Quart. 72-73. The amendment is clearly a grant of power to the General Court to establish a limited town meeting form of government in towns of over 6,000 inhabitants, upon the terms and subject to the conditions therein set forth.

From the time of the ratification of the 70th Amendment to date, 22 towns have applied for and received such special legislation, making a total of 33 towns with respect to which special acts have been enacted. All these acts contain provisions which in most respects are similar, differences in details being due largely to differences in local conditions. "While there is a general similarity between the statutes enacted, there are differences of detail." *Fitzgerald* v. *Selectmen of Braintree,* 296 Mass. 362, 366. A number of them have been from time to time amended. One special act (St. 1936, c. 56), applicable to the town of Braintree, was not properly accepted, as the court held in *Fitzgerald* v. *Selectmen of Braintree, supra.* The defect was cured by the reenactment of a similar statute in the following year (St. 1937, c. 17), which was duly accepted.

A schedule of all the special acts (not including amendments) is hereto annexed.

In 1931, pursuant to the recommendation of the Special Commission Created to Conduct an Investigation Relative to the Operation of Representative Town Meeting System (Senate No. 10 of 1931), St. 1931, c. 314, was enacted, inserting in the General Laws chapter 43A, authorizing towns in which a form of representative town meeting government had been established under a special statute to adopt in substitution therefor the standard form provided by that chapter. Such a change is clearly permissible. *Opinion of the Justices,* 229 Mass. 601, 610; *Fitzgerald* v. *Selectmen of Braintree,* 296 Mass. 362, 366.

*Designation of Town Meeting Members*
*At Large and the Authority Therefor*

All the special acts except one (Swampscott) contain some provision for town meeting members at large. All those prior to G. L. c. 43A, with the same exception, designate expressly certain officials to serve in that capacity. The standard form in chapter 43A provides for members at large to be designated by town by-laws. Since the enactment of the standard form three special acts (Wellesley, Braintree and Natick) have made similar provision and the others have designated officials as in the earlier acts.

The validity of such provisions in special acts passed before the adoption of the 70th Amendment cannot be questioned, but there is a serious question as to their validity in special acts passed thereafter, since legislative authority is restricted thereby to the establishment of a form of town government providing for a town meeting limited to *elected* inhabitants. It seems that the distinction between the authority conferred by the 2d Amendment and the narrower authority, in that respect, conferred by the 70th Amendment did not occur to those responsible for the drafting either of the special acts after the adoption of the 70th Amendment or of the standard form, and that it was assumed that the earlier forms could still be followed. See Report of Special Commissioner, Senate No. 10 of 1931, pp. 7-8, 11.

In the first place there can be no question but that the phrase "a town meeting limited to such inhabitants of the town as may be elected" excludes members designated ex officiis either by statute or by town by-law. The words "elect" and "election" occur frequently in the Constitution, and always in the sense of choosing by vote a person to fill an office.

In respect to towns of over 6,000 but under 12,000 inhabitants, it seems that there can be no escape from the conclusion that the designation of town meeting members at large is beyond the authority conferred by the 70th Amendment.

In respect to towns of over 12,000 inhabitants, it might be contended that authority to designate town meeting members at large was still conferred by the 2d Amendment as originally adopted, undiminished by the provisions of the 70th Amendment. But to such a contention, it seems, a conclusive answer is furnished by the decision in *Fitzgerald* v. *Selectmen of Braintree,* 296 Mass.

362. That was a petition for a writ of mandamus to prevent town officers from carrying out the provisions of the special act of 1936. Without any intimation that the number of inhabitants was a material factor (in fact Braintree had in 1936 a population of over 16,000), the opinion opens with the statement that "The issue to be decided is whether that statute has become operative in conformity to art. 70 of the Amendments to the Constitution," and holds that the statute had not become operative in Braintree because "the consent and acceptance required by art. 70 of the Amendments to the Constitution" could not be found. This case then must stand as authority for the proposition that the 70th Amendment governs all special acts enacted for the establishment of a limited town government.

In view of the inclusive wording of the amendment, making it applicable wherever a town contains more than 6,000 inhabitants, and in view of the rule that constitutional provisions are not to be given a constricted meaning, but are to be construed broadly and according to the common understanding of the words used, it can hardly be doubted that the court in the *Braintree* case correctly held that the case was governed by the 70th Amendment, and that the same is true in all cases of special acts enacted after the adoption of the 70th Amendment. See *Attorney General* v. *Methuen*, 236 Mass. 564, 573; *Opinion of the Justices*, 262 Mass. 603, 605; *Opinion of the Justices*, 297 Mass. 577, 580; *Opinion of the Justices*, 308 Mass. 619, 626.

It remains to consider the application of the amendment as a limitation on legislative power in respect to amendments of special acts and in respect to general legislation such as is contained in G. L. c. 43A.

So far as concerns the provisions in the provisos of the 2d and 70th Amendments prescribing the procedure of application and consent, it is evident that they control only the original establishment by special act of the form of government authorized by the amendment, and do not control further legislation, for reasons which may be largely historical, but which seem also to be quite consonant with the apparent purpose of the provisos to regulate the initial action changing the form of government. *Larcom* v. *Olin*, 160 Mass. 102; *Cunningham* v. *Mayor of Cambridge*, 222 Mass. 574; *Attorney General* v. *Methuen*, 236 Mass. 564, 571-576. The office of a proviso is to express a condition or qualification

limiting the generality of the preceding provision. *Attorney General* v. *Methuen*, 236 Mass. 564, 573-574; *Opinion of the Justices*, 254 Mass. 617, 620.

But the provision in the 70th Amendment authorizing the establishment of a form of town government with "a town meeting limited to such inhabitants of the town as may be elected" is not in any proviso; it is a part of the substantive grant of power to the General Court and is a limitation upon that power. It is subject to the rule that a constitutional provision is to be interpreted as stating a broad and general principle, regulative of all future conditions within its terms. *Opinion of the Justices*, 261 Mass. 523, 543-544; *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 523-524; *Attorney General* v. *Methuen*, 236 Mass. 564, 573; *Opinion of the Justices*, 308 Mass. 601, 613. The amendment requires that in the limited form of town government town meeting members shall be elected, and it is therefore not competent for the General Court to provide that they shall be selected in any other way. "When the Constitution requires that certain officers, designated by titles, . . . shall be appointed or chosen in a particular manner, it is certainly not competent for the legislature to provide that officers thus designated by the titles of the offices they hold, shall be chosen or appointed in any other way." *Dearborn* v. *Ames*, 8 Gray, 1, 15. See *Opinion of the Justices*, 117 Mass. 603, 604.

These considerations lead to the conclusion that the General Court has not the power, either by special statute establishing a limited form of town government in a particular town, or by amendment of such statute, or by general law, to include among the members of a limited town meeting, in addition to the members who are elected, members at large designated either by statute or by town by-law.

Recognition must be given to the fact that from the time of the ratification of the 70th Amendment the General Court in all legislation, both special and general, establishing a limited form of town government, has uniformly included some provision for town meeting membership at large, and to the rule that long continued interpretation of a constitutional provision by the legislative department of the government must be taken into consideration in determining the true construction of a provision of doubtful import. *Commonwealth* v. *Parker*, 2 Pick. 550, 557;

*Fitzgerald* v. *Selectmen of Braintree,* 296 Mass. 362, 367. But the rule does not apply where the meaning is clear; *Commonwealth* v. *Parker, supra; Portland Bank* v. *Apthorp,* 12 Mass. 252, 257; *Fairbank* v. *United States,* 181 U. S. 283, 306-311; see *Kay Jewelry Co.* v. *Board of Registration in Optometry,* 305 Mass. 581, 596; and it can hardly be maintained that town meeting members at large are elected. The true explanation of the legislative practice undoubtedly is that the effect of the 70th Amendment was assumed to be simply to lower the previous limitation in the requisite number of inhabitants from 12,000 to 6,000, and that the new limitation on legislative power respecting the selection of town meeting members was overlooked. See Report of the Special Commission, Senate No. 10 of 1931, p. 11.

G. L. c. 43A, in section 5, contains a provision that "Subject to such conditions as may be determined from time to time by the members of the representative town meeting, any registered voter of the town who is not a town meeting member may speak at any representative town meeting, but shall not vote." It is suggested that, pursuant to the authority thus given, a town by-law would be appropriate which would provide suitable seats for designated officers within the rail, convenient for participation in the discussion of matters before the town meeting.

SCHEDULE OF SPECIAL ACTS PROVIDING FOR LIMITED TOWN MEETINGS

1. *Brookline* ..... Spec. St. 1915, c. 250.
   Apparently not applied for as required by Art. 2 of the Amendments.
   .....St. 1921, c. 36.
   This repeals and substantially reenacts the earlier statute. Apparently properly applied for and accepted.
2. *Methuen* ..... Spec. St. 1916, c. 116.
   Not properly applied for and not in force. See *Attorney General* v. *Methuen,* 236 Mass. 564, 576-577.
   .....St. 1921, c. 241.
   This substantially reenacts the earlier statute. Apparently properly applied for and accepted.
3. *Watertown* ..... Spec. St. 1919, c. 205.

4. *Winthrop* ..... St. 1920, c. 427.
   Recites that town contains more than 12,000 inhabitants and that act was properly applied for under Art. 2.
5. *Arlington* ..... St. 1920, c. 642.
6. *Weymouth* ..... St. 1921, c. 61.
7. *Greenfield* ..... St. 1921, c. 440.
8. *West Springfield* ..... St. 1922, c. 311.
9. *Wakefield* ..... St. 1926, c. 36.
   Not accepted.
10. *Belmont* ..... St. 1926, c. 302.
11. *Dedham* ..... St. 1926, c. 358.
12. *Dartmouth* ..... St. 1927, c. 26.
13. *Milton* ..... St. 1927, c. 27.
14. *Swampscott* ..... St. 1927, c. 300.
15. *Saugus* ..... St. 1928, c. 55.
16. *Winchester* ..... St. 1928, c. 167.
17. *Lexington* ..... St. 1929, c. 215.
18. *Ludlow* ..... St. 1929, c. 336.
19. *Fairhaven* ..... St. 1930, c. 285.
20. *Danvers* ..... St. 1930, c. 294.
21. *Wellesley* ..... St. 1932, c. 202.
22. *Needham* ..... St. 1932, c. 279.
23. *Webster* ..... St. 1933, c. 13.
24. *South Hadley* ..... St. 1933, c. 45.
25. *Easthampton* ..... St. 1933, c. 178.
26. *Milford* ..... St. 1933, c. 271.
27. *Adams* ..... St. 1935, c. 235.
28. *Falmouth* ..... St. 1935, c. 349.
29. *Amherst* ..... St. 1936, c. 10.
30. *Amesbury* ..... St. 1936, c. 39.
31. *Braintree* ..... St. 1936, c. 56.
    *In Fitzgerald* v. *Selectmen of Braintree*, 296 Mass. 362, the court held that this act was not properly accepted.
    ..... St. 1937, c. 17.
    This repeals and substantially reenacts the earlier statute. Apparently properly applied for and accepted.
32. *Natick* ..... St. 1938, c. 2.
33. *Palmer* ..... St. 1939, c. 110.

## The Federal Threat to Massachusetts Land Titles

It is familiar history that after the revocation by the English Court in 1684 of the Charter of the "Colony of Massachusetts Bay", the royal governor, Edmund Andros, who arrived in 1686 questioned and threatened all the land titles and so agitated the inhabitants that the confirmation of titles was one of the principal subjects of discussion in connection with Province Charter of 1692, which finally confirmed them in sweeping terms.

Never since 1686 (except during the period of the American Revolution) have Massachusetts titles been so threatened with uncertainty as they are today under the majority opinion of the Supreme Court of the United States (Reed and Frankfurter J. J. dissenting and Jackson, J. not sitting) in *U. S.* v. *California,* (hereinafter referred to) and the announced intention of the Attorney General of the United States referred to in the resolution of the Massachusetts legislature (hereinafter printed) as follows:

> "The Attorney General of the United States has stated publicly before a joint hearing by a committee of the Congress that he intends to file suit against other littoral states."

As we are convinced that the bar of Massachusetts and their clients throughout the commonwealth have not yet realized the implications and practical effects of these proceedings we reprint the following documents for their information. The situation resembles that which existed between 1686 and 1692 but the people of Massachusetts were more awake and conscious of it at that time. The majority of the court, in its opinion, by words amounting, practically, to a suggestion, has expressly recognized the authority of Congress to act and, in our opinion, we of Massachusetts need, and should seek, congressional action to confirm the titles against the effects of the majority opinion, as we needed and sought and secured confirmation by the Province Charter of 1692.

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In a pamphlet entitled "This Can Happen to Any State" or "What the Tidelands Issue Is All About" by Fred N. Howser, Attorney General of California, dated April 5, 1948 appears the following quotation:—

"This ruling (of the Supreme Court giving federal government

control over submerged lands) is the reversal of what all competent people have taken to be the law relating to those lands. The result is a veritable pandemonium. The alarm is nation-wide. The decree has opened a Pandora's box from which germinating influences may spring to upset acquired titles and established procedures."

MANLEY O. HUDSON,
Former Judge of World Court
Professor of International Law,
Harvard University

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At the hearings before the committees of Congress, the Governor and the Attorney General of Massachusetts have been represented by former Assistant Attorney General Nathan B. Bidwell, in cooperation with the representatives of the governors and attorneys general of other states in support of the pending bill, Senate 1988 and companion bills in the House.

The documents reprinted below for the information of those who may wish to communicate with their representatives in Congress are as follows:

1. Senate 1988.
2. The Resolution of the Massachusetts Legislature of March 18, 1948 in support of Senate 1988.
3. The report of the Special Committee of the American Bar Association and the resolutions of the House of Delegates of that association adopted without a dissenting vote in support of Senate 1988.

The same bill numbered H.R. 5992 has passed the House by a vote of 257 to 29 and is now pending in the Senate.

F.W.G.

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**Senate 1988**

IN THE SENATE OF THE UNITED STATES

January 16, (legislative day, January 14), 1948

Mr. Moore (for himself, Mr. McCarran, Mr. Knowland, Mr. Bricker, Mr. Hawkes, Mr. Butler, Mr. Holland, Mr. Eastland, Mr. Martin, Mr. Ellender, Mr. Saltonstall, Mr.

O'Conor, Mr. O'Daniel, Mr. Downey, Mr. Connally, Mr. Byrd, Mr. Overton, Mr. Hickenlooper, Mr. Brooks, and Mr. Capper) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL

To confirm and establish the titles of the States to lands and resources in and beneath navigable waters within State boundries and to provide for the use and control of said lands and resources.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States of America, recognizing—

(a) that the several States, and the others as hereinafter mentioned, since July 4, 1776, or since their formation and admission to the Union, have exercised full powers of ownership of all lands beneath navigable waters within their respective boundaries and all natural resources within such lands and waters, and full control of said natural resources, with the full acquiescence and approval of the United States and in accordance with many decisions of the Supreme Court and of the executive departments of the Federal Government that such lands and resources were vested in the respective States as an incident to State sovereignty and that the exercise of such powers of ownership and control has not in the past and will not impair or interfere with the exercise by the Federal Government of its constitutional powers in relation to said lands and navigable waters and to the control and regulation of commerce, navigation, national defense, and international relations;

(b) that the several States, their subdivisions, and persons lawfully acting pursuant to State authority have expended enormous sums of money on improving and reclaiming said lands and in developing the natural resources in said lands and waters in full reliance upon the recognized rule of State ownership; and

(c) that a recent decision of the Supreme Court held that the Federal Government has certain paramount powers with respect to a portion of said lands without reaffirming or settling the ultimate question of ownership of such lands and resources, but said decision recognizes that the question of the ownership and control of said lands and natural resources, is within the "congressional

area of national power" and that Congress will not execute its powers "in such a way as to bring about injustices to States, their subdivisions, or persons acting pursuant to their permission"; it is hereby determined and declared to be in the public interest that title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and the right and power to control, develop, and use the said natural resources in accordance with applicable State law are hereby recognized, confirmed, established, and vested in the respective States or the persons lawfully entitled thereto under the law as established by the decisions of the respective courts of such States, and the respective grantees, lessees, or successors in interest thereof; and the United States hereby releases and relinquishes unto said States and persons aforesaid all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources, and releases and relinquishes all claims of the United States, if any it has, arising out of any operations pursuant to State authority upon or within said lands and navigable waters.

Sec. 2. As used in this Act—

(a) the term "lands beneath navigable waters" includes (1) all lands within the boundaries of the respective States which are covered by waters which are navigable under the laws of the United States, and all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each respective State or to the boundary line of each such State where in any case such boundary extends seaward (or into the Great Lakes or Gulf of Mexico) beyond three geographical miles, and (2) all lands formerly beneath navigable waters, as herein defined, which have been filled or reclaimed;

(b) the terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, and persons holding grants or leases from a State to lands beneath navigable waters if such grants or leases were issued in accordance with the law of the State in which such lands are situated. Sec. 3. There is excepted from the operation of the first section of this Act—

(a) all lands and resources therein or improvements thereon which have been lawfully acquired by the United States from

any State or from any person in whom title had vested under the decisions of the courts of such State, or their respective grantees, or successors in interest, by cession, grant, quitclaim, or condemnation, or from any other owner or owners thereof by conveyance or by condemnation, provided such owner or owners had lawfully acquired the right, title or interest of any such State; and

(b) such lands beneath navigable waters within the boundaries of the respective States and such interests therein as the United States is lawfully entitled to under the law as established by the decisions of the courts of the State in which the land is situated, or which are held by the United States in trust for the benefit of any tribe, band, or group of Indians or for individual Indians.

Sec. 4. (a) The United States retains all its powers of regulation and control of said lands and navigable waters for the purposes of commerce, navigation, national defense, and international affairs except those powers and rights specifically recognized, confirmed, established, and vested in the respective States and others by the first section of this Act.

(b) The United States shall have the right and power, when necessary for national defense, to exercise the preference right to purchase the said natural resources or to acquire and use any portion of said lands by proceeding in accordance with the due process of law and paying just compensation.

Sec. 5. Nothing in this Act shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the respective States relating to the ownership or control of that portion of the subsoil and sea bed of the Continental shelf lying seaward and outside of the area of lands beneath navigable waters, described in section 2 hereof.

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## Resolution of the Massachusetts Legislature in Support of Senate 1988

On March 18, 1948, a resolution reciting the historical background and established claims of Massachusetts under the royal charters, and the exercise of jurisdiction under them and the subsequent uninterrupted exercise of jurisdiction over all the lands and rivers and islands and tide-lands and coastal waters by the

Commonwealth after the separation from England and following the treaty of 1783 and the repeated recognition of the title of the states by the federal government and the federal court continued in part as follows:

*Whereas,* It has been recognized as a principle of international law since fifteen hundred and ninety-eight that "the adjacent part of a sea belongs to one's dominion"; and

*Whereas,* It has long been recognized that the crown of England owned the bed of the "adjoining Sea" and owned the bed of the "arms of the sea" or inland waters, by reason of his ownership of the bed of the "sea"; and

*Whereas,* In separating from England, the thirteen original colonies maintained their character as separate independent States or nations and each acquired the King's former title to all lands within its boundaries, including submerged lands under coastal waters; and

*Whereas,* By the declaration of independence, in July, seventeen hundred and seventy-six, Massachusetts and the several colonies asserted their character as "Free and Independent States"; and

*Whereas,* The treaty of peace with Great Britain in seventeen hundred and eighty-three acknowledged the commonwealth of Massachusetts and the several states "to be free, sovereign and independent States" and relinquished "all claims to the Government, propriety, and territorial rights of the same, and every part thereof", and defined the boundary as embracing all islands within twenty leagues of the shore, certainly relinquishing all the King's right in the coastal waters; and

*Whereas,* By the constitution of the United States, the several states reserved to the states their sovereignty and ownership to those lands within their boundaries; and

*Whereas,* Since it has been further recognized that "the title to the shore of the Sea and of the arms of the Sea, and in the soils under tide waters, vested in the several States subject to the rights surrendered to the National Government by the Constitution of the United States"; and

*Whereas,* Since the founding of the Republic, the several states have been uniformly recognized as the owners of

coastal lands and lands covered by the marginal sea within their respective boundaries; and

*Whereas,* Since a state may exercise jurisdiction over fishing, and other resources, in its coastal waters only by reason of the principle that "the jurisdiction of a State is coextensive with its territory"; as held by the supreme court of the United States, and

*Whereas,* The Attorney General of the United States has stated publicly before a joint hearing by a committee of the Congress that he intends to file suit against other littoral states; and

*Whereas,* The commonwealth of Massachusetts is a littoral state and title to its shores and soils under the marginal sea is presently in danger of being taken from the commonwealth; and

*Whereas,* The commonwealth of Massachusetts may lose further the power and right to regulate fishing and other matters in its coastal waters; and

*Whereas,* It has long been held that the commonwealth of Massachusetts owns the beds underlying its inland navigable waters; and

*Whereas,* The federal government has attacked this rule of state ownership of lands under inland navigable waters as "unsound", a "fallacy", "patently unsound"; and

*Whereas,* For the first time in history the supreme court of the United States, in its decision in the California case referred to "qualified ownership" by the several states of "lands under inland navigable waters, such as rivers, harbors, and even tidelands, down to low-water marks"; and

*Whereas,* Many valuable and historic sites are now located on these lands, including Massachusetts Institute of Technology, properties of Harvard College, the Boston Public Library, Back Bay residential area, Boston Public Gardens and numerous other properties, an area in extent of well over fifty per cent of Boston; and

*Whereas,* Such ownership by the commonwealth has been recognized for centuries; and

*Whereas,* As a result of the decision in the California case, such ownership is now in jeopardy; and

*Whereas,* There are now pending before the Congress of the United States, S. 1988 and similar bills, the purpose of which is to confirm in the several states title to these lands and resources in and beneath the navigable waters within state boundaries; and

*Whereas,* Such bills have the active support of forty-six governors and forty-four attorneys general, representatives of the several states; and

*Whereas,* Since hearings on such bills are shortly to be concluded, and it being in the highest public interest immediately to advise the Congress of the United States of the views of the general court of the commonwealth of Massachusetts with regard to the passage of such bill; now therefore be it

*Resolved,* That the general court of the commonwealth of Massachusetts approves the action of its governor and its attorney general and their official representatives with regard to their support of S. 1988 in the joint hearings by the senate and house committees of the Congress; and be it further

*Resolved,* That the general court of the commonwealth of Massachusetts petitions the Congress to pass immediately S. 1988 or other suitable legislation to forever quiet the titles of the several states to submerged lands under the marginal sea and inland navigable waters within their respective boundaries and to all resources in and under said lands; and be it further

*Resolved,* That the general court of the commonwealth of Massachusetts petitions its representatives and senators in the Congress of the United States to vote for and actively participate in the enactment of S. 1988 or similar legislation; and be it further

*Resolved,* That copies of these resolutions be forthwith transmitted by the state secretary to the president of the United States, to the presiding officers of each branch of Congress and to the members thereof from this commonwealth.

## Report of Special Committee of American Bar Association in Support of Senate 1988

At the last meeting of the Association held in Cleveland a resolution which was introduced by John D. McCall, of Dallas, Texas, was, after consideration and report of the resolutions committee and further discussion on the floor of the Assembly, referred to a special committee to be appointed by the President for study and report to the House of Delegates at the midwinter meeting. This committee, designated by President Gregory pursuant to this authorization, submits the following report:

The so-called California tidelands case filed by the Attorney General, sought to establish, alternatively, that the United States "is the owner in fee simple of or possessed of paramount rights in the power over the submerged lands extending three miles distant from the shore line of the state of California". The Supreme Court in that case (*California* v. *U. S.*, 67 Sup. Ct. 1658, 91 L. Ed. 1414) did not hold that the United States had title to such lands, but did hold that the "federal government rather than the state has paramount right and power over" such lands, "an incident to which is full dominion over the resources of the soil under that water area, including oil." In its majority opinion the court gave the principal reasons for its holdings in these words:

> "The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States' relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it."

In the course of the opinion the court said:

"That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. * * * And this assertion of national dominion over the three-mile belt is binding upon this court."

This court then held:

"Now that the question is here we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast and that the federal government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."

It was admitted that the original constitution of California adopted in 1849, included within the state's boundary the water area extending three miles from the shore (Cal. Const., Art. XII, Sec. 1); that the Enabling Act which admitted California to the Union ratified the territorial boundary thus defined; and that California was admitted "on equal footing with the original states in all respects whatsoever," (9 Stat. 452). With these premises admitted California contended that its ownership follows from the rule originally announced in *Pollard's Lessee v. Hagan*, 3 How. 212, wherein it was held that the original states owned in trust for their people "their navigable waters and the soil under them," and that Alabama, because admitted into the Union on an equal footing with other states had thereby become the owner of the tidelands within its boundaries. The government admitted under the *Pollard* case, as explained in later cases, "California has a qualified ownership" of lands under inland navigable waters such as rivers, harbors and even tidelands down to the low water mark.

The *Pollard* case is cited with approval in 52 Supreme Court decisions, and 244 Federal and State Court decisions, and has been consistently followed for 100 years without dissent. The Supreme Court in the California case in this connection says:

"As previously stated, this court has followed and reasserted the basic doctrine of the *Pollard* case many times. And in doing so it has used language strong enough to indicate that the court then believed that states not only owned

tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not. All of these statements were, however, merely paraphrases or offshoots of the *Pollard* inland water rule and were used, not as enunciation of a new ocean rule, but in explanation of the old inland water principle."

The court also says:

"There are three such cases whose language probably lend more weight to California's argument than any others."

The court then cites and discusses *Manchester* v. *Massachusetts*, 139 U. S. 240, *Louisiana* v. *Mississippi*, 202 U. S. 1, and *The Abby Dodge*, 223 U. S. 166.

The court also held that at the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile belt along its borders; and that neither the English Charters granted to the colonies nor the Treaty of Peace with England showed a purpose to set apart a three-mile ocean belt for colonial or state ownership; and that the idea of a definite three-mile belt over which an adjacent nation can exercise broad dominion has been generally accepted throughout the world as a result largely of the efforts of our statesmen after we became a nation.

The limitation of the reasoning of the *Pollard* case to inland waters is contrary to the interpretation of the breadth of that rule as applied in subsequent causes by the Supreme Court. As stated by that court in *Louisiana* v. *Mississippi*, 202 U. S. 1 (52):

> "The maritime belt is that part of the sea which in *contradistinction to the open sea* is under the sway of the riparian states, which can exclusively reserve the fishery * * * for their own citizens, whether fish or pearls or amber or other products of the sea." (Emphasis ours).

The history of this rule as shown in the cases and text writers indicates that at common law it began with the sovereign's ownership of the adjoining sea and was extended to inland waters as "arms of the sea", thus forming one rule of ownership applicable to all navigable waters without any distinction as to whether in-

land or seaward (see *Gould on Waters*, 3rd Ed. 1900; *Martin* v. *Waddell*, 16 Peters 367, *Weber* v. *Board of Harbor Commissioners*, 18 Wall 57, and *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, the *Great Lakes* case).

In view of the discussions by many early writers, the references in many early cases and documents, it is difficult to see how the court reached the conclusion that the original Colonies did not own some area seaward from their shores.

> For example, the 1584 Raleigh Grant conveyed the "* * * royalties * * * as well *marine* as other within the saide landes * * * or the seas thereunto adjoining."
>
> The 1611 Virginia Charter granted the soil, minerals, etc., "* * * both * * * upon the main, and also within said islands and seas adjoining."

Similar expressions appear in the other Colonial charters and patents.

Immediately following the formation of the original states many of them commenced and continued to enact legislation exercising rights of ownership and jurisdiction in the marginal sea, one example being the 1798 Act of the Rhode Island General Assembly prohibiting any person from keeping more than two lobster pots "upon or within three miles of any of the shores of the state." (See other charters and other examples set forth in Appendix "E" to brief of the State of California filed in the Supreme Court).

The committee feels that there is ample authority for the proposition that the respective states did have ownership to some extent in the adjoining marginal seas, and that even though the precise breadth of the seaward area of the states may not have been called into question in the early days, the three-mile limit was more the nature of an establishment as a minimum and what had been unsettled was only the extent or the breadth of ownership and not the fact of ownership. As stated by Mr. Justice Reed in the dissenting opinion:

> "There were, of course, * * * variations in the claims of sovereignty, jurisdiction or ownership among the nations of the world. As early as 1793, Jefferson, as Secretary of State, in a communication to the British Minister, said that the

territorial protection of the United States would be extended 'three geographical miles' and added:

> " 'This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.' "

In concluding its opinion the Supreme Court in the California case said:

> "* * * we cannot and do not assume that Congress, which has constitutional control over government property, will execute its powers in such way as to bring about injustices to states, their subdivisions or persons pursuant to their permission."

The committee believes that Congress should take action in the matter for the following reasons:

(1) The Supreme Court in this case holds that California does not own the seaward areas within its boundaries, contrary to principles established in a long line of prior decisions by the court. This ruling will no doubt be applied to other states. An Act of Congress removing the effect of the decision is necessary to confirm and establish state ownership, which has been thought to exist since the days of the Colonies. *Under the authority of the case itself, Congress has the power to take such action.*

(2) The case holds that the United States has paramount rights and authority in such seaward areas, including dominion over its resources. This is a new concept, a federal power superior to title; it gives without ownership, the right to appropriate resources without compensation.

(3) While the Government in this case did not assert rights in inland waters such as bays, lakes and inlets, neither the opinion nor the decree entered in the case defines inland waters with the result that in many cases it would be impossible to determine where a state ownership ends and federal "paramount rights" begin.

(4) While the Government made no claim in the California case to inland waters, the opinion of the court refers to state ownership thereof as a "qualified" ownership, thus casting doubt upon the title of the states to such waterways and the soil and re-

sources thereunder. Federal legislation is needed to quiet state ownership of inland waters as against federal claims.

(5) By reason of the theory of the opinion that the federal government has the "paramount right" to the resources in the open sea within the limits of the littoral states because it may need these resources for national defense or to conduct foreign relations, state ownership of inland waters and public lands and private ownership of upland areas and their resources may be questioned later. If need can determine paramount rights in the first case, it is an easy second step for the courts to hold that need can determine ownership in the latter cases.

(6) The new concept that the Federal Government has the "paramount right" to take property without compensation because it may need that property in discharging its duty to defend the country and conduct its foreign relations can have no logical end except that the Federal Government may take over all property, public and private, in the United States when some public official such as the Secretary of National Defense, for example, may say that the Government needs this property in carrying out these duties. Under this theory the Federal Government could nationalize all of the coal mines and coal deposits, all of the iron mines and mine ore deposits, all oil and gas fields and all other prospective oil and gas producing areas, and indeed all of the natural resources of the country, without paying the owners therefor, wholly in disregard to the Fifth Amendment.

(7) The basic philosophy underlying the majority opinion in the California case is the inherent sovereignty doctrine, heretofore applied to external affairs, that the Federal Government has inherent sovereign powers as a nation, not dependent upon an express or implied grant in the Constitution. This is the first case in which such doctrine has been applied to purely internal affairs and to relative rights and powers of the nation and of the states over lands within their borders. So applied, the rule is at variance with the historic background and the political philosophy upon which the federal government was founded and with the express provisions of the Tenth Amendment. The inherent sovereignty doctrine lays the foundation for converting the federal government into a super-state, not dependent for its powers upon the Con-

stitution and therefore not subject to the checks and balances contained in that doctrine.

The Constitution, Art. I, Sec. 7, par. 17, specifies the land within the several states over which the Federal Government may exercise authority: first, the district (not exceeding 10 miles square) as may be cession of particular states and acceptance by Congress become the seat of government of the United States, and

> "* * * all places purchased by the consent of the Legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock yards and other needful buildings."

The exercise of exclusive federal authority in these seaward areas, historically and legally heretofore recognized as within the boundaries of the several states, runs counter to the whole theory of the Union of the sovereign states. Ownership by the states of these seaward areas, heretofore recognized, has never interfered with the paramount rights of the Federal Government; and such ownership if now confirmed and established in the states, would not interfere with such paramount rights of the Federal Government.

(8) In its opinion the Supreme Court said:

> "That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact * * * and this assertion of national dominion over the three-mile belt is binding upon this court."

This presents a new concept of constitutional powers, or rather the lack of power of the Supreme Court. The court, by taking jurisdiction in this case, assumed that it had the power to settle a dispute between the Federal Government and a state as to the ownership of property within a state. It then denies that power by its statement that the assertion of national dominion by the executive department of the Federal Government is binding on the Supreme Court. If this be true there is no forum to which a state or individual can resort for protection against the assertion of titles or rights in property by the executive department of the federal government. While this statement was applied to the three-mile belt, admittedly that area was within the boundaries of

the state of California and the doctrine would have equal application anywhere within the boundaries of California and hence within the boundaries of any state.

## THE RECOMMENDATIONS OF THE COMMITTEE, ALL OF WHICH WERE ADOPTED BY THE HOUSE

### I

BE IT RESOLVED, That the House of Delegates of the American Bar Association approves and urges the adoption of S. 1988 offered in the Senate of the United States, on January 16, 1948, at the Second Session of the Eightieth Congress entitled "A Bill to confirm and establish the titles of the states to lands and resources in and beneath navigable waters within state boundaries and to provide for the use and control of said lands and resources"; and that copies of this resolution be sent to the appropriate committees of the Senate and House of Representatives, to other members of Congress, and to the President of the United States.

*Regarding First Recommendation*

At the meeting of the Assembly when the McCall resolution was under debate it was urged by one speaker that this is a matter of general governmental policy, non-legal in character on which the Supreme Court had spoken and therefore of a political nature and that the Association should not take any action. In this connection the committee believes that the following factors should be taken into account:

(a) Before the decision of the Supreme Court the Association at its annual meeting at Cincinnati in December of 1945, adopted a resolution urging Congress to quitclaim and relinquish title or claim to submerged off-shore lands to the several states; and Congress actually passed a resolution to that effect which, however, was vetoed by President Truman. If it was proper for the Association to act at that time, and the committee believes it was, we think it is still proper for the Association to act.

(b) The National Association of Attorneys General and a number of state and local bar associations have adopted resolutions urging action by Congress.

(c) As lawyers, the committee believes we are entitled to comment on the character of reasoning under which the Supreme Court reached the result that the Federal Government has "paramount rights in, and full dominion and power over," these off-shore areas, "an incident to which is full dominion over the resources of the soil under that water area, including oil"; and that we as lawyers should comment on this new and novel federal theory of paramount power to take mineral resources regardless of "bare legal title" or "mere property ownership."

(d) On questions involving our basic theory of government, particularly in connection with the relation between the states and the Federal Government, it seems to us that the lawyers have a special duty to comment on anything which appears to be a radical departure from the situation as it has maintained and been recognized in one way or another since this nation was founded.

There was introduced in the Senate of the United States at the Second Session of the Eightieth Congress by Senator Moore, for himself and 19 other Senators, on January 16, 1948, S. 1988,

A BILL, "To confirm and establish the title of the states to lands and resources in and beneath navigable waters within state boundaries and to provide for the use and control of said lands and resources".

A copy of this bill is attached to and made a part of the report of the committee. It has the approval of the National Association of Attorneys General and the Conferences of State Governors; and the committee believes that it accomplishes the objectives for proper congressional action as set out above. Accordingly, it is the recommendation of this committee that the first resolution *supra* be adopted. [It was adopted]

II

BE IT RESOLVED, That the House of Delegates of the American Bar Association in approving and urging the adoption of S. 1988 is opposed to any compromise or amended measure which may be offered which would have the effect of quitclaiming or relinquishing everything within the three-mile off-shore belt, except the minerals therein; and

that copies of this resolution be sent to the appropriate committees of the Senate and House of Representatives, to other members of Congress and to the President of the United States.

*Regarding Second Recommendation*

Word has reached this committee that the Department of Justice and the Department of the Interior may join in a move to exclude all issues from the tidelands question, except oil and other minerals, and are working on a proposed bill to offer to Congress. On the basis of rumor the bill will convey to the states all rights and interests of the federal government in these lands, except the oil, gas and other minerals. By such move it is said that these departments hope to eliminate all support for any legislation that would convey absolute fee title to the states, except from the states now producing, or which may expect to produce oil or other minerals from these lands.

If such a move is made it would probably be by amendment offered to S. 1988, which would occur after this meeting of the House of Delegates has adjourned, and unless action is taken by the House of Delegates in anticipation of such attempted compromise, the representatives of the Association would not be authorized to take any position with regard thereto. If ownership of minerals in the Federal Government in these areas is admitted and retained, then the principle by which the government acquired them is also admitted. Such compromise, if adopted, would be the assertion of federal rights to minerals by Congress, rather than a denial thereof. Clearly if it is right for Congress to restore to the states all of the property except oil, gas and other minerals which the California case took away from the States, it is equally right that the oil, gas and other minerals so taken away from them also be restored to them. Accordingly, the committee recommends the adoption of this second resolution, *supra.* [It was adopted]

III

BE IT RESOLVED, by the House of Delegates of the American Bar Association, That the President of the Association, or someone designated by him, is hereby authorized

to appear before, or to submit a statement to, the appropriate committees of Congress in support of S. 1988, and in opposition to amendments thereto or to other bills which may be introduced in Congress to accomplish the compromise referred to in the second resolution in this report.

*Regarding Third Recommendation*

Hearings before the sub-committee of the Senate Judiciary Committee on S. 1988 are scheduled to begin on February 23, 1948; and the sub-committee has invited a representative of the American Bar Association to be present and testify at the hearing. At the suggestion of President Gregory the chairman of this committee has advised the secretary of the sub-committee that, if the hearing extended beyond February 25, a representative of this committee might appear before the sub-committee, subject to authorization therefor by the House of Delegates. This committee as constituted, has authority only to study the question and report at this meeting. Accordingly, if the House of Delegates desires this matter to be presented to the appropriate committees of the Senate and House of Representatives, then a resolution along the lines of the third resolution, *supra*, might be adopted. [It was adopted]

Respectfully submitted,

JAS. L. SHEPHERD, JR., Chairman
WM. A. DAUGHERTY
JAMES T. FINLEN, JR.
GURNEY E. NEWLIN
ALVIN RICHARDS

## The Literary Fraction "And/or"

*From "Dicta" (published by the Denver and Colorado Bar Associations) December 1947*

By Worth Allen

*Of the Denver bar. Shortly after this article came to our attention we observed being published in one of the local newspapers a "summons in action for annulment of marriage and/or divorce." The relief prayed for was a "decree of annulment of the marriage of the plaintiff and defendant, and/or a decree of divorce." In the interests of bringing to the members of the Colorado bar items which will be helpful to them in the practice of the law, the columns of* Dicta *will be made available to anyone who wishes to explain a decree of annulment and divorce.*

I present to the readers of Dicta some of the many criticisms of the term or phrase "and/or".

In *Employers' Mutual Liability Ins. Co.* v. *Tollefsen,* 219 Wis. 434, 263 N. W. 376, 377, we find the Supreme Court of Wisconsin using this language:

> "We are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients."

After quoting the foregoing statement by the Wisconsin court, the Supreme Court of Georgia said, in *Davison, et al.* v. *Woolworth Company,* 186 Ga. 663, 198 S. E. 738:

> "While disavowing the expressions used by the learned judge in his classification of those who are responsible for its choice, we deplore the use in contracts and statutes of that hybrid, contradictory combination, frequently as bewildering, mystifying, and perplexing as Poe's raven—or was it fiend? on the 'night's Plutonian shore'."

The following is taken from the note in 118 American Law Reports, 1368:

> "The phrase 'and/or' has been characterized as 'gibberish' and a 'confusing hybrid' which 'means nothing.' 40 Commercial Law Journal, p. 372 (August, 1935). And it is stated in an editorial in the American Bar Association Journal (vol. 18, p. 456, July, 1932) that the symbol is 'a device for the encouragement of mental laziness,' even as used in private instruments, and that it should not be used in pleadings or legislative acts. And in the same periodical (vol. 18, p. 574, September, 1932) there is a 'symposium' of letters, some expressing approval and others violent disapproval of the symbol. Among the latter are found the following epithets: 'A bastard sired by indolence (he by ignorance) out of dubiety;' 'barbarism;' 'journalese;' 'unsightly heiroglyphics.'
>
> "Epithets applied to the term by various courts are the following: 'Linguistic abomination;' 'interloper;' 'interloping disjunctive-conjunctive-conjunctive-disjunctive conjunction;' 'one of those inexcusable barbarisms which was sired by indolence and dammed by indifference;' 'freakish fad;' 'not in the English language;' 'confusing;' 'accuracy-destroying;' 'certainty-destroying;' 'freakish symbol;' 'baffling symbol;' 'a disingenuous, modernistic hybrid inept and irritating;'."

In *Drummond* v. *City of Columbus, et al.*, 285 N. W. (Nebraska) 109, the court stated:

> "The American Bar Association Journal for July, 1932, published an editorial against the use of this expression, and received so many letters that in its September, 1932, issue a symposium was published, giving opinions from many lawyers, judges, decisions of courts, and references to law magazine articles, and the majority view was against its use."

Mr. Justice Burke, in his usual trenchant style, made the following contribution to the subject in *Equitable Life Assurance Society of the U. S.* v. *Hemenover, et al.*, 100 Colo. 231, 237:

> "One further matter, not vital to a determination of any question presented, but constituting a blot on this record, forces itself upon our attention.

"Next to the prescriptions of physicians, accuracy is nowhere so imperative as in contracts, statutes and legal proceedings. It is correspondingly discouraging to find dragged into these the ingenious inventions of scriveners to confuse and befuddle. The latest and lustiest of these pests is the literary fraction 'and/or,' which appears at least fifty times in the record before us. The resulting confusion is emphasized by the fact that three of these are in demurrers, three in assignments, and one in a tendered instruction. We have not found one attributable to counsel for defendants in error. Whatever defense might be made for it elsewhere it becomes, in demurrer or assignment, a mere 'weasel' phrase, and certainly jurors could not be expected to interpret it. Mr. John W. Davis calls this a 'pollution of the English language.' Mr. George W. Wickersham refers to it as a 'barbarism,' 'one of the worst examples of "journalese",' and says, 'Its use in pleadings and court proceedings and in legislative acts is utterly unjustified.' Numerous appellate courts have been called upon to deal with it and have generally spoken of it with disrespect. * * *

". . . We wish simply to suggest the uselessness and absurdity of 'and/or' and express the hope that this is its last appearance in this tribunal."

However, the annotator in the note referred to defends the proper use of the term in private contractual instruments as follows:

"The term 'and/or', has been used for nearly a century in English mercantile and marine insurance contracts. See, for example, *Cuthbert* v. *Cumming* (1855) 10 Exch. 809, 156 Eng. Reprint, 668 (affirmed in 1855) 11 Exch. 405, 156 Eng. Reprint, 899. Its great vogue in recent times, however, has extended its use to statutes, ordinances, pleadings, and judicial records. And the neologism has even attained the respectability of a place in the general lexicons, being defined as 'either "and" or "or."' Webster's New Int. Dict. (2d ed.).

"This term is used to avoid a construction which, by the use of the disjunctive 'or' alone, would exclude the combination of several of the alternatives, or, by the use of the conjunctive 'and' alone, would exclude the efficiency of any

one of the alternatives standing alone. It takes the place of the addition, after several alternatives connected simply by 'and,' of a qualifying phrase such as 'or either' or 'or any combination thereof,' and, after several alternatives connected by 'or,' it takes the place of such phrases as 'or both,' 'or any combination thereof.'

"As thus used, this phrase, term, symbol, or character is a deliberate amphibology; it is purposefully ambiguous, its sole usefulness lies in its self-evident equivocality. When the term is properly used, however, its meaning is not indefinite or uncertain. It is broad, but not indefinite; it is elastic, but within definite bounds and for a definite purpose. If the term were used in its proper place and sense, and were restricted to private contractual instruments, instead of being interpolated, with parrot-like indiscrimination, into pleadings, instructions to juries, and the like, it is probable that the courts would have accepted it without question as a useful addition to scrivener's English.

"There has recently been, however, a very vigorous reaction against this term on the part of judges and contributors to law journals. The phrase, probably because of its ungainly appearance and its indiscriminate misuse, seems to irritate the judicial temperament, and has provoked outbursts of invective which are somewhat disproportionate to the amount of harm caused by the term in question. . . ."

*Editorial Note*

The real reason for the restrained and discriminating use of the "literary fraction" is that the bar in drafting agreements has to anticipate the possibility of litigation. The words "and" and "or" like the words "shall" and "may" frequently have interchangeable meanings. (See "Shades of 'Shall'," 30 M.L.Q. No. 2, October, 1945, pp. 42-48). That being the case, the bar, not knowing how a court will jump, uses the "fraction" at times for the purpose explained in the A.L.R. note.

The bar should remember, however, that it *is* ambiguous unless used with care. It should not be used in pleadings in Massachusetts. *Grandchamp* v. *Costello,* 289 Mass. 506; and "such an expression ought not to be used by a master in his report"; *Hanson* v. *Bradley,* 298 Mass. at p. 378. The better practice would seem to be to think the matter out "and/or" not use it at all.

F.W.G.


"THEY DON'T KNOW WHAT IS IN IT."

## "The Great Rehearsal"

By Carl Van Doren

*"The Story of the Making and Ratifying of the Constitution of the United States".*

The Viking Press — January, 1948

We heartily recommend this book for the leisure reading of lawyers, and laymen. It is an exceptionally well written story which holds the attention like a good novel and with the added stimulation of the fact that one is brought up face to face with the original problems involved in the creation of the government and the way in which they were gradually solved by the leading men whose characters and personalities stand out in bold relief from Mr. Van Doren's pages.

Judging from our own experience, even those who are more or less familiar with the story will find themselves reading it through without effort.

About twenty-five years ago we clipped from the *New York Times Magazine* the following extract from an article by Charles Willis Thompson entitled "That Dark Secret—The Constitution". The picture on the opposite page accompanied the article.

> "Most people believe that the Constitution provides for every emergency that might arise except woman suffrage and prohibition.
>
> "What is to be done about it? You can lead a horse to water but you can't make him drink. To most people the Constitution is a sacred relic in a glass case, not to be taken out or looked at. It might as well be a goldfish. A group of newspapers in different parts of the country recently combined under the lead of the *Los Angeles Times* to popularize the Constitution by getting school children all over the Union to compete in prize essays or orations. There was nothing in it for these newspapers; it is purely a patriotic move, and, as far as it went, it was a success. Hundreds of thousands of school children learned more about the Constitution than their Principals with the Faculty thrown in."

The controversy over the "court-packing" bill in 1937 also attracted popular attention to our frame of government and its

history, and the "Freedom Train", which has been touring the country since last fall exhibiting historic documents, is also stimulating popular interest and understanding. But the remarks of Mr. Thompson are still dangerously true and this fact makes Mr. Van Doren's book most timely.

As he says in his preface,

> "The Constitution has so long been rooted so deeply in American life—or American life rooted so deeply in it—that the drama of its origins is often overlooked. Even historical novelists, who hunt everywhere for memorable events to celebrate, have hardly touched the event without which there would have been a United States very different from the one that now exists; or might have been no United States at all.
>
> "The prevailing conceptions of those origins have varied with the times. In the early days of the Republic it was held, by devout friends of the Constitution, that its makers had received it somewhat as Moses received the Tables of the Law on Sinai. During the years of conflict which led to the Civil War the Constitution was regarded, by one party or the other, as the rule of order or the misrule of tyranny. In still later generations the Federal Convention of 1787 has been accused of evolving a scheme for the support of special economic interests, or even a conspiracy for depriving the majority of the people of their liberties. Opinion has swung back and forth, while the Constitution itself has grown into a strong yet flexible organism, generally, if now and then slowly, responsive to the national circumstances and necessities.
>
> "In 1787 the problem was how the people could learn to think nationally, not locally, about the United States. In 1948 the problem is how the people can learn to think internationally, not nationally, about the United Nations.
>
> "The present problem has turned many minds back to 1787 in search of a historic parallel to serve as an example."

Since preparing these comments for the press, I have read a review of the book by Professor John C. Ranney of Smith College in the American Bar Association Journal for March (p. 228). His approach differs from ours, as indicated by the following passages,

"According to the advertisements, Carl Van Doren's new book has been the subject of several highly laudatory reviews. Stringfellow Barr writes of it as a 'simple, vivid, fast-moving narrative, told in the light of our own current problem'; Clifton Fadiman thinks it worthy of a Nobel Prize; and the publishers hail it as 'by all odds the most significant book Carl Van Doren has ever written'. My own impression is that such encomiums are excessive.

"Parts of 'The Great Rehearsal', notably those dealing with the ratification of the Constitution, make lively reading; but the major portion of the book is a not-very-enlightening chronological digest of the debates and diversions of the Constitutional Convention . . . The explanation of the critical acclaim is probably to be found in the contention, implicit in the title and explicit in the preface, that the American experience in 1787 offers a valid precedent, although not a detailed pattern, for World Union in 1948. Somewhat surprisingly, however, the author, after inviting the comparison, makes no extended attempt to prove the parallel or to provide the reader with the information needed to draw conclusions for himself. . . .

"The American experience may prove invaluable in helping to overcome the not inconsiderable mechanical difficulties of world organization. But the mechanical difficulties are not the chief problem. When Mr. Van Doren writes that 'it is impossible to read the story of the making and ratifying of the Constitution of the United States without finding there all the arguments in favor of a general government for the United Nations, as well as all the arguments now raised in opposition to it', he overlooks the profound differences in political and economic interest, in form of government, and in way of life which divide the world's major powers and which have divided the ranks of the Federal Unionists themselves. In solving such conflicts, the Founding Fathers can offer us little guidance. It is only during the Constitutional Convention's debates on slavery that one seems to hear an echo of the bitterly hostile and uncompromising pronunciamentos of Lake Success; and the way in which the slavery issue was finally solved is not a happy augury for us today.

"It seems to the present reviewer that we shall begin to have fertile thinking on the subject of international peace when writers subordinate their preoccupation with constitutional machinery and terminology to a far more difficult task: the study of the essential

character of the conflicting forces and interests, and the devising of methods of common action which, unlike the acceptance of a common government, will not require the surrender of those fundamentally different political and economic principles which the United States and Russia are determined to maintain."

These comments by Professor Ranney as to the relative importance of the book in relation to thinking on international problems are searching and deserve thoughtful consideration. While we have quoted from Mr. Van Doren's preface his statement of belief in the resemblance of the problems of 1948 to those of 1787, it is not for that reason that we found the book commanding our attention. We are, in the current American slang, "fed up" with the modern fad of dominantly "economic" study and interpretation of history with its resulting cynical and deadening influence. While appreciating the suggestion of the late Judge Holmes that the progress of civilization is to some extent the result of "an enlightened selfishness" we believe that sort of emphasis can be overdone and that it tends to minimize the more stimulating influence of the constructive thinking and the force of character of individuals.

Professor Allan Nevins in the *New York Times Magazine* of April 18, 1943 said,

"Courses on current affairs are good in their place; they are not American history. Courses in sociological factors may be excellent; they are not American history. Courses in world history are more than ever indispensable now that the last defenses of isolationists are crumbling away; but they are not American history. In their innovating zeal certain adherents of the social studies have tried to break down these plain distinctions. Of course, the general movement for reviewing the various social studies as interconnected is illuminating and stimulating. Equally, of course, the modern emphasis on interpretation and ideas is healthful. But a basic structure of historical fact, taught with due attention to chronology, to *great personalities*, and to political forces and events, must be kept intact."

As part of the "basic structure of historical fact", we believe that in much of the writing about the origin of the federal constitution and its meaning there has been undue emphasis placed on the social and financial position and environment of the members of the Philadelphia convention as compared with the state

ratifying conventions (referred to in the quotation from Prof. Ranney). It was those ratifying conventions composed of many kinds of men, and the prevailing sentiment represented by them which controlled the results and it was the men of the Massachusetts convention with their plan for action who led the way to attain those results by insisting on the recommendation of a federal bill of rights. The Massachusetts story is briefly, but well, told in Mr. Van Doren's book, but, granting the relative importance of the ratifying conventions, the personal influence of the character and judgment of "great personalities", like Washington and Franklin, as well as others, needs emphasis in the world of 1948, which, as Prof. Ranney says, "is conspicuous neither for reasonableness nor for generosity". As we have said on an earlier occasion,

"the Philadelphia Convention of 1787 sat in Independence Hall —sometimes fifty-five men, generally about thirty, and constantly about twenty men, with Washington the trusted leader there all the time in the background of discussion, quiet, watchful and supremely conscious of what he had written to his brother in 1776, that this small body of men were lending their aid to frame a constitution which was "to render millions happy or miserable," and that the vision of a strong American republic for which he had fought was at stake. He did not preside at all the meetings. When they met informally in what is known as "a committee of the whole" the usual presiding officer was Nathaniel Gorham of Massachusetts, a former speaker of our House of Representatives; but Washington was there watching, listening. No modern cynics, no materialistic "economic" historians, no so-called "debunking" biographers or class prejudiced social or political critics, can undermine the truth and historical importance of that devoted human enthusiasm balanced by judgment which was the dominating influence. It was not confined to Washington—it was shared in varying degrees by others, but it was outstanding in Washington because he had, and had earned, the confidence of the people in war, and he was conscious of the responsibility which rested on him to justify that confidence in peace."

It was, in our opinion, his greatest public service.

It is because of the prevailing ignorance among laymen, as well as of the effective "forgettery" of lawyers, which, in our opinion, can be counteracted only by someone who recognizes the drama and the reality of the influence of "great personalities", as well as

of economic forces, that we recommend the reading of Mr. Van Doren's book, not because of its international importance, but because the whole structure of American Government, which has grown up as a result largely of the Philadelphia Convention, is threatened by the prevailing and cynical ignorance and indifference. It will be much easier to lose the best of what has been built up since 1787 than it was to build it up.

As the late Professor Andrew C. McLaughin of the University of Chicago said,

"The hope for successful popular government—and in fact its justification—is based on the willingness of people to think."

We believe Mr. Van Doren's book will help lawyers and laymen to think about our own government. As to international arrangements we suggest the volume (just published by the Harvard University Press) by Prof. Crane Brinton entitled "From Many One." F.W.G.

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HEADQUARTERS
FIRST NAVAL DISTRICT
NAVY BUILDING

495 Summer Street, Boston 10, Mass.

*To All Lawyers Who Are Naval Reserve Officers*

The Judge Advocate General of the Navy has requested the Commandants of all Naval Districts to submit to him a list of all Naval Reserve Officers in their district who are lawyers, regardless of their Naval Reserve classification, together with their *home addresses.*

This information is requested in order that plans may be made for the organization of Volunteer Reserve Law Units and that the JAG Journal may be distributed to officers who desire it.

*Therefore it is requested that all lawyers who are naval reserve officers* inform the District Legal Officer, First Naval District, 495 Summer Street, Boston, Massachusetts, of their home addresses in order that the files may be checked or corrected if necessary.

ROGER EDISON PERRY
Commander, U. S. Navy
District Legal Officer

## The Current Nation-wide Discussion of Methods of Selecting Judges Outside of New England

*Discussion of a Recent Newspaper Advertisement of a Magazine Article*

Ever since the constitutional changes in California and Missouri in regard to the selection of judges, there has been a movement of increasing influence in a number of other states, which adopted the method of election in the middle of the 19th century, to return to some form of an appointive system in order to counter-act and reduce to a minimum the political aspects of the elective system in these various states. The change was made in Missouri about 7 years ago by a constitutional amendment carried by about 90,000 votes. An attempt to repeal the change, which was put through the legislature and submitted to the people in 1942, was defeated and the appointive plan was retained by a popular vote of more than 180,000 and it was, thereafter, re-incorporated in the revised constitution of Missouri of 1945. A still more notable change in judicial system was recently adopted by a new constitution in New Jersey which is described in detail in the American Bar Association Journal for January 1948 (p. 5) and in the Journal of the American Judicature Society for February. In New Jersey it was not a change from an elective to an appointive system but a complete re-organization of an appointive system.

The so-called "Missouri plan" the history of which is described in detail in the American Bar Association Journal for December, 1947 (p. 1) by Mr. Justice Douglas of the Supreme Court of Missouri was, as he points out, substantially the plan developed by a Committee of the American Bar Association since 1937 and supported by the House of Delegates of that Association as a model by which a transition from an elective system to an appointive system might be accomplished.

### *The Advertisement in the Newspapers*

Following the publication of the article by Judge Douglas and the spread of information in regard to the changes in New Jersey as pointed out in the same journal for March, p. 175,

"Various agencies of public opinion began to 'get busy' for those objectives. A conspicuous instance was a full-page advertisement, 'Behind the Black Robes', published on January 23 in

the *New York Times* and many other newspapers throughout the country by the *Woman's Home Companion* (Crowell-Collier Publishing Company, New York), a national magazine stated to have an average circulation of more than 3,700,000 copies, especially among the women and the members of women's clubs, whose active and concerted support for the 'Missouri Plan' of our Association was vigorously urged.

"Ordinarily such conspicuous non-lawyer support for the 'Missouri Plan' would have been hailed with enthusiasm by members of the Bar, but this one at once aroused concern and regret among many lawyers and judges, notably in the New York State Bar Association, which was in session when the advertisement appeared and was much disturbed by it. On the recommendation of its President, Robert E. Lee, the Association voted, in effect, to express its concern that the advertisement, and the article which it summarized, placed over-emphasis on instances of judicial incompetence or corrupt selection, and might be regarded by the public as a general indictment of the American judiciary system to an extent tending to undermine confidence in the Courts and their administration of competent, impartial justice."

The protest of the New York State Bar Association in a letter from its president to the Editor of the *New York Times* is printed in the Journal referred to for March, p. 175.

Members of the Massachusetts bench and bar were also surprised and many of them disturbed at the appearance of the same full page advertisement, in the *Boston Herald* and *Traveler*, for the same reason expressed by the New York Association as above stated, although neither the article, nor the summary in the advertisement, referred to or specified objectionable conditions in the courts in the New England states. Nevertheless, it was felt that in the minds of the public, it might be understood as a sweeping criticism of all American courts.

Under these circumstances, we think the recent comments on the article and on the advertisement in the American Bar Association Journal may well be called to the attention of the bench and bar in Massachusetts, as reasonably balanced in regard to an issue which is under wide-spread discussion throughout various parts of the country other than New England.

Following the passages already quoted the American Bar Association Journal (for March) continued,

"The advertisement in the *Companion* was a condensation of an article by Howard Whitman in its February issue and was stated to have been based on the author's "first-hand survey". Many things in it were not written as a lawyer with a balanced point of view and broad perspective would probably have stated them. Many lawyers read the publication with a sense of regret that a picture on the whole one-sided had been portrayed, but with a feeling nevertheless that the article would do more good than harm, giving impetus to a good cause and rallying to it elements of public support that could not be reached by the usual efforts of Bar Associations.

"The 'ad' began with references to instances of claimed judicial unfitness, incompetence, laziness, undignified conduct, arbitrariness, etc., and of partisan selections of unfit persons as judges. Only five States, or cities in States, were identifiably named in connection with specific instances; but sweeping generalizations were made, unfavorable to incumbent judges. No effort was made to develop and present the constructive and affirmative side—the thousands of American judges whose work is conscientious, reasonably capable and diligent, scrupulously fair and impartial, consistently independent of political or other extraneous influences—most of them true and faithful ministers of justice. The challenging thesis of the 'ad' was stated:

> 'How do we get such judges? If there are too many rotten apples in the barrel, perhaps our method of picking is at fault. Thirteen of our States, including all of New England, appoint their judges. Fourteen States have tried with varying success to elect judges on a non-partisan ballot. Twenty-one States still elect them in the jamboree of party politics.'

"The advertisement did not indict or refer to the appointive federal judiciary at all, thus disregarding the fact that some of the most shocking instances of proved judicial corruption, favoritism, unfitness of temperament, and political and ideological subservience, have taken place under the system of partisan appointments to the federal bench. To have over-emphasized these few and flagrant instances would have been equally unfair to the hundreds of conscientious and competent federal judges throughout the country. . . ."

In the April issue (p. 306) the Journal continues the discussion and quotes from the February issue of the Journal of the American Judicature Society,

"Those of us who are interested in elevating the Courts and the administration of justice in public esteem will not shrink from facing facts, no matter how unpleasant, that have a bearing on the right of the judiciary to the people's respect, but at the same time, to preserve our sense of proportion, we must bear in mind that the same sort of article could be written about clergymen, congressmen or any other group of public servants. Any robe will look shabby when its seamy side is exposed to view."

* * * * *

"The *Journal* of the Judicature Society reminds us of the fact, overlooked in our March article, that Mr. Whitman recently wrote for the same national magazine an article on 'Disease a la Carte', which exposed unsanitary conditions in restaurant kitchens. Republished in the *Reader's Digest,* innumerable local campaigns to clean up dirty public-service kitchens resulted, and many lives were saved. 'The impact of "Behind the Black Robes" is bound to be tremendous,' the *Journal* frankly recognizes, 'whether or not it makes the *Reader's Digest,* as it is very apt to do, and the bench and Bar in every part of the country may well reflect upon what should be said or done about it.' "

* * * * *

"We still think that the admonitions of our March article (page 175) that advocacy of the 'Missouri Plan' need, and should, not indict our judiciary system, was and is sound."

In order that the bar in Massachusetts may be informed about a nation-wide discussion which will continue in future, we expect to describe in our next issue the "Missouri Plan", the New Jersey system, and the history of the discussion of methods of selecting judges in Massachusetts and the reasons for the Massachusetts system which, whatever its faults, has served us well since 1780.

F.W.G.

# The Continuity of New England History

*Some Historic Figures in Perspective*

**An Address at the Opening of the American History Room of Boston University, March 14, 1948**

By Frank W. Grinnell

This room has as its chief feature a series of twenty oil portraits illustrating the theme "Boston Men and the Winning of American Independence" set against the pine panelled walls. The portraits, painted and presented by Robert Savage Chase, are divided into four groups as follows:

*The Prelude*

John Winthrop
John Cotton
John Endecott
Increase Mather
Samuel Sewall
Cotton Mather
Jonathan Mayhew
Samuel Cooper

*The Crisis*

Lord Mansfield
George III
Francis Bernard
Thomas Hutchinson

*The Climax*

James Otis
Oxenbridge Thacher
Jeremiah Gridley
Samuel Adams

*The Consummation*

John Adams
Henry Knox
John Hancock
George Washington

President Daniel L. Marsh presided at the opening, at which addresses, in addition to the following, were made by Mr. Robert S. Chase of Boston and Mr. William G. Saltonstall of the Phillips Exeter Academy, Exeter, New Hampshire.

As various members of the association have expressed interest in it and suggested that it be printed in the "Quarterly" the sug-

gestion has been followed, and the address is submitted in the hope that other members of the Massachusetts Bar Association may find it interesting.

F.W.G.

## THE ADDRESS

President Marsh, Ladies and Gentlemen:

I am glad to have the opportunity to express appreciation of the combined vision and judgment of the University authorities and of Mr. Chase in planning this room as a daily reminder to students, not only of the continuity of New England history, but of the fact that the people in that story were not mere museum exhibits to be thought about as such.

In a romance called "The Old Country", by Henry Newbolt, the twentieth century hero listens to the following conversation:

"But surely in the Middle Ages they were mediaeval?"

"They were not mediaeval, they were alive."

"But quaint?"

"No, alive; and a man's life does not reside in his clothes" . . .

The hero says, "I have not yet got used to your way of speaking of these ancient inhabitants. To me their names suggest stiff stone figures on dilapidated tombs; to you they seem to be in no way different from the people in this year's red book."

The hero then has a dream, in which he sees and talks with people of the 14th century and listens to a vivid description of the battle of Poitiers and of the character of the Black Prince by a young officer who took part in it—such as a young officer in the recent war might give today of a battle on the European or Asiatic front and of the character of his commander.

We cannot think about history intelligently unless we think in terms of struggling human beings dealing with problems of their day which were just as important for them as our problems are for us today.

These pictures will help both students and teachers to understand better the "ample page rich with the spoils of time" of our story. It was said of Thomas Carlyle that whenever he wrote about a man he had, if possible, his picture before him so that he could look at him. How can anyone who has read about the influence of the New England clergy in the gradual development of thinking men of the pre-revolutionary era, look at the pictures

of Jonathan Mayhew and Samuel Cooper without a better understanding of their character and influence and why men in the 18th century listened to them—not only their congregations—but leaders like Otis and the Adams's in consultation?

The history of freedom—which means, of course, freedom of individuals—consists largely of the history of the thought of many individuals to which other individuals respond in endless succession. One of our most balanced historical thinkers, the late Prof. Andrew C. McLaughlin said,

> ". . . the hope for successful popular government—and in very fact its justification—is based upon the willingness of people to think."[1]

Turning now to the continuity of history which these portraits reflect and quoting again from Prof. McLaughlin,

> "You cannot in discussion of American History lose sight of the seventeenth century." He emphasized the fact
>
> "That the work of the American Revolutionist was not so much to create something brand new, as to take up the old, and to make old visions real, give dreams a body, transmute hopes into tangible institutions." And again,
>
> "One thing appears to be certain: individual liberty, law, limited government, federalism, local and personal responsibility and power—all these cannot continue unless supported by intelligence and by some portion of that earnestness and consecration which established our constitutional principles and enabled America to survive."

Applying these words, the outstanding characteristics of the men portrayed on these walls, whatever their faults, were "earnestness and consecration" in their thinking and action for our benefit as well as their own. The exceptions, such as George III and Governor Bernard were foils for the thinking of the 18th century Americans.

In a paper on "John Winthrop and the Constitutional Thinking of John Adams",[2] I have shown that the consciousness of independence in New England dates back to Winthrop and his

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[1] "Foundations of American Constitutionalism."

[2] "John Winthrop and the Constitutional Thinking of John Adams", 63 Mass. Historical Soc. Proceedings (1929-30) pp. 91-119. See also McLaughlin "Foundations of American Constitutionalism."

contemporaries. Winthrop's journal contains the secret instructions to Edward Winslow, agent of the colony in England in 1646, stating, among other things, that "our charter gives us absolute power of government", and the conception of the Bay Colony as a "free state without the realm of England", owing allegiance to the king only and not to parliament, persisted, in spite of the practical obstacles to its assertion, until the ultimate denial of the prerogative of the crown by the revolution and the Declaration of Independence.

Emerson in his "Representative Men" said,

> "Great men are more distinguished by range and extent than by originality."

This should be remembered in thinking about men like Thacher, Otis and John Adams—suggestive minds, original in the sense of freshness, but distinguished more by the range and extent of their informed reflection and intellectual courage. They were reading lawyers. They were familiar with the early history of New England and they simply continued it.

Mr. Chase has referred to a paper, written in 1765 in which Adams said,

> "I always consider the settlement of America with reverence and wonder, as the opening of a grand scene and design in Providence for the illumination of the ignorant and the emancipation of the slavish part of mankind all over the earth."

And ten years earlier, when he was under twenty years of age, he wrote,

> "Soon after the Reformation, a few people came over into this new world for conscience sake. Perhaps this apparently trivial incident may transfer the great seat of empire to America. It looks likely to me."

### *The Men of the 17th Century*

Coming now to brief comments on the phases of the story represented by the different individuals portrayed before us, as I see them, the four 17th century figures of John Winthrop, John Cotton, John Endicott and Increase Mather reflect in the relative austerity of their appearance, the conditions under which people lived and thought in that century.

In the words of the late William G. Sumner[3] it was "An embryo society, not however of savages but of civilized men. They came armed with the best knowledge and ability which men, up to the time of their migration, had won . . . It is the isolation with the necessity of self-adjustment to the conditions, which gives interest and value to the story of the colonies as social experiments . . . But from the social germ planted by these colonists all that we have and are has grown up by all the working and fighting, suffering and erring which go into the life of a big, ambitious and vigorous society."

All this together with a stern religious belief, a constant consciousness of God and of the real presence in everyday life of the devil whom it was their primary duty to fight, is reflected in the appearance of these representatives of Massachusetts in the 17th century when New Englanders began to clear the fields and build the New England stone walls.[4]

*Cotton Mather and Samuel Sewall*

The next two—Cotton Mather and Samuel Sewall—represent among other things, the beginning of the end of the Puritan theocracy and the dawn of a greater tolerance. Cotton Mather believing in witchcraft, as most of the rest of the world did then, and before him, and a long time after him, stimulated the creation of the illegal court which sat from June to September, 1692, and condemned to be hung (not burned) with the assistance of juries, about twenty-four persons as witches—a short episode which is still referred to throughout the country as a disgrace to Massachusetts, although thousands were put to death all over the world about and before that time, not only for witchcraft, but for heresy. It is not realized, as it should be, that, when the whole story is told of the public repentance of Judge Samuel Sewall and of the entire Salem jury, we have a unique example of the moral courage of 17th century New Englanders. As Prof. George Lyman Kittredge has pointed out in his "Witchcraft in Old and New England",[5]

[3] "The Challenge of Facts", 290.

[4] It is unfortunate that there is no known portrait of Nathaniel Ward of Ipswich, successively lawyer, clergyman, and author of "The Simple Cobbler of Agawam"—the first law-giver of the colony whose draft of the Body of Liberties of 1641 was accepted instead of the draft of John Cotton, which was excessively biblical and was known as "Moses, his Judicials."

[5] pp. 338 and 365.

"The Salem outbreak was not due to Puritanism . . . it is no sign of exceptional bigotry or abnormal superstition. Our forefathers believed in witchcraft not because they were Puritans, not because they were Colonials, not because they were New Englanders—but because they were men of their time. They shared the feelings and beliefs of the best hearts and wisest heads of the 17th century. What more can be asked of them?

"The most remarkable things about the New England prosecution were the rapid return of the community to its habitually sensible frame of mind and the frank public confession of error made by many of those who had been implicated. These two features, and especially the latter, are without a parallel in the history of witchcraft. It seems to be assumed by most writers that recantation and an appeal to heaven for pardon were the least that could have been expected of judge and jury. In fact, no action like Samuel Sewall's, on the part of a judge, and no document, like that issued by the repentant Massachusetts jurymen, have yet been discovered in the witch records of the world."

That is the really significant part of the story.

### *Jonathan Mayhew and Samuel Cooper*

Mayhew and Cooper, already referred to, were both Boston Ministers but they represent also the continuing influence of men like Rev. George Phillips, John Cotton, the Cambridge Platform of 1648 of the independence of New England Churches; of John Wise of Essex County and of other clergymen in other counties, in the gradual building of the sense of independence.[6]

### *Lord Mansfield*

The next figure is Lord Chief Justice Mansfield. Like some other great Englishmen he was not an Englishman, but a Scot. His picture appears because he was one of the chief advisors and supporters of the English policy toward the colonies represented by the other pictures in the group—of King George III, Governor Bernard and Governor Hutchinson. While, in the words of

[6] See Baldwin "The New England Clergy and the American Revolution."

a later distinguished English lawyer and judge—Lord Birkenhead[7] —that policy was "stupid" and "profoundly wrong", while Mansfield was the subject of violent attack by the anonymous "Junius", America, as well as England, owes him much because he was, not only one of the greatest, and most modern, of English judges, to whom we are all indebted for developing law to meet modern needs, but he was also the outstanding judicial supporter, in the 18th century, of the principle of religious tolerance.

### *Gridley, Thacher, James Otis Jr. and Samuel Adams*

In the next group, Jeremiah Gridley, Oxenbridge Thacher and James Otis Jr. represent the pre-revolutionary trained fighting lawyers who taught the untrained judges and developed the ideas of freedom through controversy.

Following his famous argument against the issuance of writs of assistance (or general search warrants) in 1761 (an argument which fired the imagination of the young John Adams and is now painted on the wall of the State House) Otis became, for about ten years, the stimulating intellectual leader in the Massachusetts House of Representatives and the suggestive collaborator with Sam Adams the political organizer of the period. Caustic things have been, and are still, said about Otis. Unfortunately he destroyed his papers. He was temperamental and a man of varied moods, as many other influential men are—indeed, the fact is often the mainspring of progress. But, regardless of all comments, when looking at the picture of this suggestive mind, remember that even his enemy, Governor Hutchinson, while a judge, is reported to have said "that he never knew fairer or more noble conduct in a pleader than in Otis". Remember also that, after obtaining a verdict of £2000 damages for injuries to his head (which undoubtedly contributed to his ultimate derangement) from the assault by the English customs officer, he voluntarily waived the damages because the man apologized. That fact is more eloquent as to his character than adjectives. The documents are still on file in the Supreme Judicial Court.[8]

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[7] "Fourteen English Judges."

[8] See also "James Otis and His Influence as a Constructive Thinker", Bostonian Society Proceedings, Feb. 1935 and XX Mass. Law Quart. No. 3 May, 1935.

*John Adams, Knox, Hancock and Washington*

Finally John Adams, Henry Knox, John Hancock and George Washington are fittingly combined to represent the consummation of the struggle for independence.

It was John Adams who carried through the Declaration of Independence and the appointment of Washington as commander-in-chief.

Sir George Trevelyan—the English historian of the American Revolution—considered Franklin, Washington and John Adams the greatest of the revolutionary figures.[9] Quoting again from Prof. McLaughlin,

> "We shall never appreciate the Revolution till we recognize that it was not enough simply to break the British Empire; the job was to institutionalize principles and to establish firm and effective government."

Hon. Mellen Chamberlain, the former librarian of the Boston Public Library—writing in 1884,[10] said of him,

> ". . . There were wise men—some, estimated by conventional standards, much wiser than John Adams; but none whose judgments on Revolutionary affairs have proved more solid and enduring. There were younger men of genius and older men of great experience in affairs; but John Adams was just at that period of life when genius becomes chastened by experience without being overpowered by adversity . . . At one time, an immense unpopularity fell upon him and now, even the remembrance of his great services seems to be growing indistinct . . . It matters little to the stout old patriot with what measure of fame he descends to remote age, for he will never wholly die; but to us and to those who come after us it is of more than passing consequence that we and they withhold no

[9] He said, "The three greatest names among the founders of the Republic were, beyond all question, those of Washington, Franklin and John Adams." Trevelyan, "George the Third and Charles James Fox", vol. 2, 170-171. John Adams was an exceptionally articulate person of varying moods. One may find all kinds of extravagant contradictory suggestions, in the ten volumes of his writings, which tend to obscure him in his prime. A detached vision is needed to get him and his work in perspective. Even when he had become a storm centre, as our second president, he performed the greatest single act of civil service in our history by the appointment of John Marshall as Chief Justice.

[10] "John Adams, the Statesman of the Revolution."

tribute of just praise from those unpopular men who deserve the respectful remembrance of their countrymen." John Adam's' "services ought never to be forgotten as long as free, united, constitutional government holds its just place in the estimation of the people."

*Henry Knox*

General Henry Knox, the Boston bookseller turned soldier, who brought the guns from Ticonderoga to Washington at Dorchester Heights and served in Washington's Cabinet, is a fitting military figure in the group.

*John Hancock*

John Hancock, a gay, popular, high-living, ambitious business and political adventurer, with the political courage to risk his neck as a rebellious companion of Sam Adams, and to risk it still further as president of the Continental Congress by attaching his famous signature at the head of the signers of the Declaration of Independence, but smaller in character than most of the other men portrayed, became the first popular governor under our constitution, and served for about ten years. His shrewdly preserved popularity became a turning point in the birth of the nation.

The year was 1787. The revolution was over. The thirteen Colonies had set up their state governments, but they were not pulling together. Rows developed within and between them. State tariff barriers were set up and threatened the business and stability of the nation, the government of which was too weak in structure to meet its problems.

The constitution of the United States drafted by the Philadelphia convention was submitted to State Conventions. When the Massachusetts Convention met, in the old church on Long Lane, (now Federal St.) there was an obvious majority in opposition because there was no bill of rights, and because they feared a central government at a distance for the same reasons that they had objected to distant government from London under King George.

Hancock, the popular governor, was chosen president of the convention, but, for a time, did not preside because he had the

gout which was politically convenient. Finally, after about three weeks of debate, with the opposition still in the majority, the plan of proposing amendments to the first Congress to accompany unconditional ratification was thought out. The proposals were drafted, undoubtedly by Parsons, and were submitted to Hancock, who then took his seat as presiding officer, submitted the anonymous proposals, and carried ratification by nineteen votes. That story is now painted as the central mural in the hall of the Massachusetts House of Representatives. Bills of rights were not new, the ideas were old, but the first effective action to secure them in the Federal Constitution by what became the first ten amendments, came in this way from Massachusetts, and set the example of how to do it for the other states, particularly Virginia and New York, where great convention battles followed our action here.[11]

*George Washington*

And now we come to Washington—the greatest of them all—who rose to the occasion at our most critical period, not merely because he was "first in war", but because he was "first in peace and first in the hearts of his countrymen". I refer to his service of about four months as presiding officer of the Philadelphia convention of 1787 which drafted the federal constitution. I have explained elsewhere, and in print,[12] why I believe this to be the greatest of his many public services although it is not commonly so regarded.

In the Boston Athenaeum there is a volume of three hundred pages, printed in 1800, containing sixteen eulogies and funeral orations delivered after Washington's death in that year. It is full of adjectives, adverbs, classical allusions and rhetoric generally which many of us might describe today as "hot air", but which illustrates the sort of public speaking which Americans liked to listen to at that time. I turned over the pages for something to which we can respond today, and I found it in the oration of a New York clergyman named John M. Mason. In the midst of his

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[11] See Harding "The Federal Constitution in Massachusetts"; Van Doren, "The Great Rehearsal", 197-204.

[12] "What George Washington Should Mean to Us Today", Old South Association "Studies in History", Feb. 22, 1943, 28 Mass. Law Quart. No. 4, Dec. 1943, 73-84.

rhetoric he described what I believe to be the actual facts, as follows:

> "Those elements of discord which lurked in the diversity of local interest; in the collision of political theories; in the irritations of party; in the disappointed or gratified ambition of individuals; and which threatened the harmony of America, it was for WASHINGTON alone to control and repress. His tried integrity, his ardent patriotism, were instead of a volume of arguments for that system which he approved and supported. Among the simple and honest whom no artifice was omitted to ensnare, there were thousands who knew little of the philosophy of government, and less of the nice machinery of the Constitution; but they knew that WASHINGTON was wise and good; they knew it was impossible that he should betray them; and by this they were rescued from the fangs of faction. Ages will not furnish so instructive a comment on that cardinal virtue of republicans, confidence in the men of their choice; nor a more salutary antidote against the pestilential principle, that the soul of a republic is jealousy. At the commencement of her federal government, mistrust would have ruined America; in confidence, she found her safety."

A characteristic story is told of Calvin Coolidge while president. Some newspaper man interviewed him as to his views of the so-called "debunking" biographies. Coolidge simply looked out of the window at the Washington Monument and said: "Well, the Monument's still there." In 1875 the New York Tribune derided that monument as "the big furnace chimney on the Potomac". But today we appreciate it as symbolic of a great character.

Returning again to Sumner—he told his students at Yale

> ". . . in a century and a half or two centuries there has grown up here all this vast and complicated industrial organization which we now see, with its hundreds of occupations, its enormous plant and apparatus of all kinds, connected throughout by mutual relations of dependence, kept in order by punctuality and trustworthiness in the fulfillment of engagements, dependent upon assumptions that men will act in a certain way and want certain things, and,

> in spite of its intricacy and complication, working to supply our wants with such smoothness and harmony that most people are unaware of its existence. They live in it as they do in the atmosphere."

But the continuation of all this and of popular representative government as McLaughlin said depends on "The willingness of people to think" and history is the great teacher of independent thought. "It is not merely antiquarianism."

In the teaching of American history, as Prof. Allan Nevins has said, "A basic structure of historical fact, taught with due attention to chronology, to *great personalities*, and to political forces and events, must be kept intact."

All this is what an illustrated room for the teaching and study of American history means to me.

I congratulate the University and Mr. Chase on their joint efforts in creating such a room.

**Restoration of Inns of Court**

The Inns of Court in London, as is well known, were very seriously damaged during the recent World War. To assist in the work of restoring the Middle Temple, the Temple Church and the Hall of Gray's Inn, so intimately connected with our own history and our free institutions, the American Bar Association has constituted a committee to conduct a county-wide appeal to American lawyers to contribute to the cost. The committee consists of John W. Davis of New York, Chairman, Mr. Justice Jackson of the Supreme Court, John L. Hall of Boston, L. R. Mason of New York, George Wharton Pepper of Philadelphia, Frank T. Boesel of Milwaukee and Joseph M. Proskauer of New York. Under the direction of this committee local committees are being formed in the different states, including Massachusetts. The Massachusetts committee is made up of the following men:

Robert G. Dodge, Chairman
Talcott M. Banks, Jr., Treasurer

William H. Best
Norman W. Bingham
William E. Collins
Hon. Fred T. Field
Walter Powers
Mayo A. Shattuck
(all of Boston)

Hon. Louis S. Cox, President
Massachusetts Bar Association

David A. Rose, President
Law Society of Massachusetts

Jacob J. Kaplan, President
Boston Bar Association

Nelson A. Foot, President
Berkshire County Bar Assoc.

Thomas C. Crowther, President
Bristol County Bar Association

Peter I. Lawton, President
Essex County Bar Assoc.

Timothy M. Hayes, President
Franklin County Bar Assoc.

Louis C. Henin, President
Hampshire County Bar Assoc.

Walter L. Stevens, President
Hampshire County Bar Assoc

Thomas M. A. Higgins, Pres.
Middlesex County Bar Assoc.

Raymond F. Barrett, Pres.
Norfolk County Bar Assoc.

Geo. L. Wainwright, Past Pres.
Plymouth County Bar Assoc.

Archibald M. Hillman, President
Worcester County Bar Assoc.

The following letter will shortly be sent to the lawyers of the commonwealth and it is hoped that generous contributions will be made:

TO THE LAWYERS OF MASSACHUSETTS:

This Committee has been organized to cooperate with the American Bar Association's Special Committee on Restoration of Inns of Court, whose appeal for funds, descriptive pamphlet and subscription blank are sent to you herewith.

We hope that you will be willing to support this worthy project. We understand that the American Bar Association Committee has already received gifts from lawyers in various parts of the country, ranging in amount from $5 to $1000. It is contemplated that when the fund is donated to the Inns of Court a roster of contributing American lawyers (showing the names of the contributors, but not the amounts of their gifts) will also be presented, to be kept as a permanent testimonial of the determination of the American bar to sustain the ideals of freedom which these ancient institutions symbolize.

We are advised that the Treasury Department has ruled that contributions to the fund are deductible for federal income tax purposes.

The significance of the results of this appeal will depend not alone upon the size of the total fund contributed by American lawyers, but also upon the number of them who participate.

We hope that you will be moved to send a contribution. Checks should be payable to Talcott M. Banks, Jr., Treasurer, and sent to him at 53 State Street, Boston 9.

Sincerely yours, for the Committee,

Chairman.

**Manual of Probate Procedure by Walter H. Gilday**
(Eugene W. Hildreth, Inc. 1947)

This book by the Plymouth County Register of Probate should prove useful to the practicing lawyer. As stated by Mayo A. Shattuck in his "Foreword" ". . . Many important matters of probate trial procedure and the basic requirements of the individual Probate Courts are all clearly explained in this volume. The list of probate forms in the final chapter will save many a telephone call to the register, and will enable the attorney to select the proper form for a particular proceeding . . . This manual will also be of great assistance to the Bar in pointing out differences in probate practice in the various counties, and thus will, I hope, contribute to the ultimate goal of a standardized practice in the Commonwealth."

The book is a guide to statutes and to rules and forms established by the Supreme Judicial Court under G.L. chap. 215, s. 30, and to the varying interpretations in different counties under those rules and forms. These rules and forms are theoretically uniform in their meaning for all counties. The book does not deal with the decisions and opinions of the Supreme Judicial Court as to the effect of the statutes, rules and forms. Conceivably there may be something more to say, to supplement the book, after the decision of a case now pending before the Supreme Judicial Court, involving certain variations in practice, especially as to notice on accounts.

**State Administrative Law—$1,000 Prize Essay Contest**

Judge Rossman of the Supreme Court of Oregon has made the following announcement in the American Bar Association Journal for April, 1948, p. 329:

The Section of Administrative Law of the American Bar Association announces its inauguration of an essay-writing contest on the subject of State Administrative Law. Each entrant will be required to write about the State administrative law of the State in which he has been admitted to the practice of law. If he has been admitted in more than one State, he should write about the law of the State in which he practices.

The Section will give a prize of $1000 to the writer whose essay is adjudged to be the best. All essays must be submitted to the Secretary of the Section on or before November 1, 1948. The secretary is Miss Patricia H. Collins, Assistant Solicitor General's Office, Department of Justice, Washington 25, D. C.

The contest is open to all members of the American Bar Association, with the exception of officers of the Section and members of its Council. No essay will be accepted if previously published. All rights and title to essays submitted must be deemed to be the property of the Section. Any copyright to an essay must be assigned to the Section.

Each essayist should review and analyze the administrative law of his State, both legislative and as evidenced by judicial decision. He should accompany all statements with citations to sources. He may make comparisons with administrative law of other jurisdictions, but his theme must be the administrative law of his own State.

Each essay must be restricted to 4000 words, including quoted matter and citations in the text. Footnotes and annotations will not be included in the computation of the number of words, but excessive use of such material may be penalized by the judges of the contest. Clearness, brevity of expression and thoroughness of analysis will be taken into consideration.

Inquiries concerning the contest should be addressed to Mr. Omar C. Spencer, Chairman, Contest Committee, Yeon Building, Portland 4, Oregon.

GEORGE ROSSMAN, *Chairman*
*Section of Administrative Law*